United States Court of Appeals
for the Second Circuit

APPENDIX

76-7476

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United States Court of Appeals
For The Second Circuit

No. 76-7476

NEWBURGER, LOEB & CO., INC. as Assignee of Claims of David Buckley and Mary Buckley,
Plaintiff-Appellant-Cross-Appellee,

against

CHARLES GROSS, MABEL BLEICH, GROSS & CO., and JEANNE DONOGHUE,
Defendants-Appellees-Cross-Appellants,

NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, RICHARD D. STERN, WALTER D. STERN, and ROBERT L. STERN as Executors of the Estate of Leo Stern, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGENBURG, HARRY B. FRANK and JEROME TARNOFF as Executors of the Estate of Ned D. Frank, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG & GRUTMAN, a Partnership, (formerly known as Finley, Kumble, Underberg, Persky & Roth and Finley, Kumble, Heine, Underberg & Grutman) and LAWRENCE J. BERKOWITZ,
Additional Defendants on Counterclaims-Appellants-Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS
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JOINT APPENDIX—TRIAL TRANSCRIPT
Volume III—A-1423–A-2246

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PAUL H. FITZGERALD, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SHAW:

Q Mr. Fitzgerald, how are you employed?

A By the New York Stock Exchange, as the vice president.

Q How long have you been employed by the New York Stock Exchange?

A Approximately eight years.

Q Would you describe the nature of your duties with the New York Stock Exchange?

A I am currently in charge of the Member Firm Surveillance Division which is responsible for the oversight of the financial and operational health of the member firm community.

Q How long have those been your duties?

A Since approximately September of 1973.

Q I wonder if I can place this document, Plaintiffs' Exhibit 118, before you and ask you if you recognize this as a rule of the Board of the New York Stock Exchange in effect commencing February 13, 1956.

A It appears to be an extract from a copy of the constitution and rules of the Exchange and I would assume that all of the things being equal, that is the rule that was in effect as of that date.

MR. SHAW: I offer this in evidence.

MR. GRUTMAN: No objection.

MR. MANDEL: Let me see it and let's find out how long it stayed in effect.

MR. SHAW: I showed you that two days ago.

MR. MANDEL: Rule 504 and 505?

MR. SHAW: Yes.

VOIR DIRE EXAMINATION

BY MR. MANDEL:

Q Rules 404 and 405 are now renumbered as of today, are they not?

A There currently exists a Rule 404 and Rule 405.

Q That are substantially the same as 504 and 505?

A You will have to bear with me. I have not read them.

Q I am not criticizing you or bugging you in any way, sir. Don't misunderstand me.

(Pause.)

A In essence, the current Rule 405 is the same as the then existing Rule 505.

Q Do you know when the numbering was changed?

A No, I don't, sir.

Q So that all we have established is the starting date.

MR. MANDEL: I am willing to stipulate on the basis of Rule -- excuse me a second --

Q I show you a document --

MR. MANDEL: I guess we have to mark it. What is this?

MR. SHAW: That has not been marked.

THE COURT: The next number is AA.

MR. SHAW: This is not voir dire.

THE COURT: It is serving that purpose, because otherwise you may get an objection to this exhibit that I will sustain. So let's accept what is going on.

(Defendants' Exhibit AA was marked for identification.)

Q I ask you whether Defendants' Exhibit AA is not a Stock Exchange document.

A It is.

Q And it bears a date of 1963 on it, does it not?

A It does.

Q And it refers to Rule 405, does it not?

A Correct.

Q And if you examine it, you will see, I think, that

Rule 405 is substantially the same as the rule you have been talking about as what, rule --

A Rule 505.

Q Does AA indicate to you that by March 15th of 1963 the rule had been renumbered and was then and is now Rule 405?

A Yes, it does do that.

MR. MANDEL: I am willing to stipulate to put into evidence in this case the current Rule 405 together with AA.

MR.SHAW: And 504 and 505, the understanding being there was a change from this rule, as indicated in 118, to the current Rule 405, some time in 1963, as indicated in AA?

MR. MANDEL: No.

MR. SHAW: The substance of both rules is the same?

MR. MANDEL: Let's just use 405.

THE COURT: How many rules are you offering, Mr. Shaw?

MR. SHAW: Your Honor, there is a Rule 504 and 505 referred to in Exhibit 118. That is the rule referred to in the clearing agreement, Exhibit 2, I believe in Paragraph 8. At the present time there is in effect a Rule 405.

THE COURT: Which covers both of those?

MR. SHAW: Yes. And in the conversion table in the back of the New York Stock Exchange constitution, you will see that present Rule 405 had been Rule 504 and 505. That is seen from this document before me (indicating).

I would offer present Rule 405 and I will make a Xerox of this available as a substitute.

THE COURT: Just the rule itself?

MR. SHAW: Yes.

MR. MANDEL: I have no objection on the present rule. It is just the time of the old rule has not been established and the time of the change has not been established.

THE COURT: What are you prepared to stipulate, it was some time prior to 1963?

MR. MANDEL: Yes.

THE COURT: With that stipulation, we will put in a Xerox copy of 405.

MR. SHAW: May I read Rule 405 to the jury, your Honor?

THE COURT: You may.

MR. SHAW: Rulr 405 reads as follows:

"Every member organization is required through a general partner, a principal executive officer or person or persons designated under its provision of Rule 342B1, use due diligence to learn the essential facts relative to every customer, every order, every cash or margin account accepted or carried by such organization and every person holding power of attorney over any account accepted or carried by such organization.

"2, supervise diligently all accounts handled by registered representatives of the organization.

"3, specifically approve the opening of an account prior to or promptly after the completion of any transaction for the account of or with a customer provided, however, that in the case of branch offices the opening of an account for a customer may be approved by the manager of such branch office but the action of such branch office manager shall within a reasonable time be approved by a general partner, a principal executive officer or person or persons designated under the provision of Rule 342B1. Member, general partner officer or designated person approving the opening of the account shall prior to giving his approval be personally informed as to the essential facts relastive to the customer and to the nature of the proposed account and shall indicate his approval in writing on a document which is part of the permanent records of his office or organization."

I am not going to read subparagraph 4.

Your Honor, I have shown or made available to Mr. Mandel prior to today various documents which had been subpoenaed from the files of the New York Stock Exchange. They have been numbered Exhibits 53 through 117. At this point I offer these documents in evidence, your Honor.

MR. MANDEL: I have had no chance to read them and I have no idea what is in them, your Honor, and I can't just say yes in a blanket way. If they will give them to me overnight, I will look at them. There is probably 300 pages of reading material there.

MR. SHAW: He said on the record yesterday that I placed these on Mr. Mandel's desk, as the Court indicated I should do, and they have been on his desk in the morning, during luncheon and at the end ofthe day.

THE COURT: Let me have a look at them, please.

(Pause.)

THE COURT: Whoever did the present marking here should put a little "ID" for identification after all these numbers.

MR. SHAW: I will be glad to do, your Honor. I am the one who marked them.

THE COURT: Otherwise it gives the impression that they are in evidence.

MR.SHAW: You will also note, your Honor, they are in pencil.

THE COURT: I do.

MR .SHAW: Your Honor, at one point I indicated I wanted to call somebody from the New York Stock Exchange with respect to the churning claim and the other claims. These documents for the most part relate to the claim Mr. Mandel is making rather than the churning claim and I would like not to have to call a representative of the New York Stock Exchange back twice, particularly just for the purpose of authenticating documents.

MR.MANDEL: The document can be authenticated at the moment, your Honor, without going into the question of admissibility. If Mr. Fitzgerald says they are authentic documents, I have no problem with that.

THE COURT: I show you Exhibits 53 through 117 marked for identification at this point --

MR. SHAW: May I inquire, your Honor?

THE COURT: Let me see if I can simply this.

MR. SHAW: Your Honor, I can represent they were Xeroxed in my office by my secretary, that they were made available to me pursuant to subpoena duces tecum I served upon the New York Stock Exchange, and these are the documents.

THE COURT: All that leaves you with is a statement that they are found in the Stock Exchange's files. That doesn't get you beyond that point.

MR. SHAW: Excluding the documents there which are the minutes of the Executive Committee of Newburger, Loeb, your Honor, I could establish by asking this witness that the documents bearing the caption New York Stock Exchange or the signature New York Stock Exchange are records made or kept by the New York Stock Exchange in the regular course of business and are correspondence, memoranda, writings of the Exchange.

(Pause.)

MR. MANDEL: Do these substitute the entire file given to you?

MR. SHAW: The entire file given to me must have weighed 20 pounds.

MR. MANDEL: These are documents selected by you?

MR. SHAW: Yes.

MR. MANDEL: Where is the balance of the file?

MR. SHAW: The balance was returned to the New York Stock Exchange.

THE WITNESS: With the exception of these documents, these appear to be copies of material from the files of the Exchange (indicating).

THE COURT: 71, 72, 103, 102, 100, 92 and 87 are the ones that the witness has excepted.

MR. MANDEL: I concede authentication, based on what the witness says. If they are relevant and not prejudicial, I will have no objection to their admissibility, but I think I have to have an opportunity to know what is in them.

THE COURT: Without any question?

MR. SHAW: No question about that.

THE COURT: Do you have any further questions?

MR. SHAW: No, your Honor.

MR.MANDEL: I have some questions, your Honor.

THE COURT: Mr. Mandel, we will give you these overnight --

MR. SHAW: Are the numbers in the record as to whastwas taken out?

THE COURT: I read them.

CROSS EXAMINATION

BY MR. MANDEL:

Q Are you an expert, Mr. Fitzgerald, in surveillance and compliance of member firms?

A I don't know that I characterize myself as an expert.

Q But that is your business?

A Yes.

Q And you are familiar with Rule 405?

A In its substance, yes.

MR. MANDEL: Your Honor, do youhave my Exhibit AA?

THE CLERK: Here it is.

Q And you are familiar with Exhibit AA, which is an educational release of the New York STock Exchange?

A Only to the extent that I just perused it a minute ago.

Q Mr. Fitzgerald, in your opinion, under Rule 405 -- strike that.

You know what a clearing house is and an originating house, right?

A Assuming you are talking about a member firm clearing transactions versus one that introduces transactions, yes.

Q Does the Stock Exchange regard the clearing house as the carrying firm?

MR. GRUTMAN: Your Honor, I think this is entirely new matter. Mr. Mandel is adopting this witness for purposes of his own --

MR. MANDEL: Yes, I am.

MR. GRUTMAN: And he will be bound by the answers of the witness.

MR. MANDEL: That is not what the rule is.

THE COURT: Go ahead.

A There is a subtle distinction between types of clearing firms. If an account is introduced to a clearing firm on a fully-disclosed basis, that cccount is carried by the clearing firm.

Q What that means, fully disclosed, if the customer knows, for example, that it is Newburger, Loeb clearing by courtesy of Gross & Company, that is a fully disclosed situation?

A That is correct.

Q And under the rules of the Stock Exchange, that means that the real broker, the broker of record, the carrying broker is Newburger, Loeb, right?

A That is right.

Q And Rule 405 applies to the carrying broker?

A It applies to all member firms.

Q It applies to both?

A Correct.

Q They are both responsible for compliance with Rule 405, is that correct?

A Correct.

Q And the primary responsibility, however, rests with the carrying house, isn't that correct?

A I don't know that I would make that distinction. Every member firm is subject to all of the rules of the

Exchange.

Q So there is at lease equal responsibility?

A Yes.

Q And the practice is, is it not, that the carrying house is usually the larger house, right?

A Yes.

Q And it keeps the records?

A Usually.

Q And it has a compliance department, usually, is that correct?

A Not always, but usually.

Q It is required to have some system of compliance, is that correct?

A Yes, in essence.

Q Would you say that if the records of account showed overtrading for a period of 4-1/2 years, the carrying house should have been aware of that?

A The carrying house would be aware of all the activity in the account.

Q And under 405 they would have the responsibility to scrutinize the records for overtrading, right?

A Not necessarily so. It would depend upon the actual clearing agreement between the introducing firm and the carrying firm.

Q In your opinion, as far as the Stock Exchange Rule 405 is concerned, and putting aside the question of initiating the account, under the rules of the Exchange can the carrying house relieve itself of the responsibility for compliance?

A I don't think I would term it quite that way. The carrying firm by contract with the introducing firm can assign that responsibility to the introducing firm and cover itself in that manner.

Q Can it be relieved in that manner from responsibility to the customer?

A From responsibility to the customer?

Q Yes.

A No.

Q Can it be relieved in that manner from responsibility to the Stock Exchange?

A Provided -- in a hypothetical situation, it could, yes.

Q What would that hypothetical situation be?

A If the carrying firm could convince the Stock Exchange that the contract it had entered into with the clearing firm had provided for diligence as to accounts been left with the introducing firm and that it had assured itself that adequate systems were in place in the introducing firm to insure complaince, it would,in a hypothetical situation, relieve itself of this responsibility.

MR. MANDEL: May I have the exhibit?

MR. SHAW: The clearing agreement, Exhibit 2?

MR. MANDEL: Yes.

Q I ask you to examine paragraph 7 of Exhibit 2 and state whether in your opinion that paragraph relieves or purports to relieve the clearing house from responsibility for compliance with regard to such items as churning.

MR. SHAW: Objection.

THE COURT: Well, the form of the question is poor.

Mr. Fitzgerald, looking at that clearing agreement, is that one that fits into your hypothetical situation?

THE WITNESS: No. This one paragraph only addresses itself to Gross & Company and accepting responsibility for losses arising from errors and it allows Newburger, Loeb the opportunity to turn down an account if it finds it unacceptable and I would have to assume Newburger, Loeb was doing the screening of accounts.

MR. SHAW: Could the witness' attention be directed to the entire agreement, just not one paragraph?

THE COURT: I think that would be fair enough. Mr. Fitzgerald, you will have to read through that document.

(Pause.)

THE WITNESS: Could I have the question again?

(Question read.)

THE WITNESS: No, it doesn't.

Q By that you mean this is not an agreement which shifts to the originating house all of the burden of compliance?

A No, I am sorry, I misunderstood. This clearly gives primary responsibility for learning the essential facts to the introducing firm, Gross & Company.

Q At the start of the account?

MR. GRUTMAN: Oh, now, your Honor --

THE COURT: He may inquire.

Q How about compliance over a four and five-year period after that?

A It doesn't speak to any partiuclar time limits, but paragraph 6 seems to imply that the essential responsibility for knowing the customer or knowing the financial responsibility of the customer lies with Gross & Company.

Q Does that apply to the start of the account or on a particular basis?

MR. GRUTMAN: Your Honor, we had it, we had it.

A Paragraph 10 seems to apply to the start of the account, paragraph 6 seems to imply that this is a particular responsiblity of Gross & Company.

Q Does this agreement provide a defense to the carrying house in an action by the customer?

MR. GRUTMAN: Objection, your Honor.

MR.SHAW: Objection, your Honor, legal conclusion. He is no longer testifying as an expert.

MR. GRUTMAN: That is a question of law for the Court to instruct the jury.

MR.SHAW: Incidentally, this is not that sort of an action.

THE COURT: I think as put, I will sustain the objection.

Q In your opinion, would the existence of this agreement, and I am referring back to your earlier testimony, between the carrying house and the originating house, present a defense to the carrying house in an action by the customer?

MR. SHAW: Objection, your Honor. It is not applicable to this factual situation.

MR. GRUTMAN: Inasmuch as this is a claim by the clearing house against the initiating house, your Honor --

MR. MANDEL: Your Honor, this is an assigned claim of Mr. Buckley against the --

THE COURT: I appreciate that, but I am not quite sure what the scope of this witness' expertise covers here to be able to answer.

You are not a lawyer?

THE WITNESS: No, sir.

THE COURT: Your earlier answers were with regard to responsibility as between one house and another, is that right?

THE WITNESS: That is correct.

THE COURT: Does that get you into areas of legal responsibility?

THE WITNESS: No, not really, your Honor. We do have a group of attorneys that have to approve the clearing agreement per se, but not from the legal point of view, more from the --

THE COURT: If you were looking at this to see, for example, on behalf of the customer what rights that customer would have -- I take it the Exchange has that in mind in lookingat such an instrument?

THE WITNESS: No, the primary purpose of the Exchange's looking at a clearing agreement is to assure itself that the introducing firm has relieved itself of financial responsibility to the customer so that its capital is not impaired by that responsibility.

THE COURT: Beyond that, you have little interest?

THE WITNESS: Correct.

THE COURT: I sustain the objection.

BY MR. MANDEL:

Q I call your attention to the first paragraph of Exhibit AA and I will read it: "Which accounts are introduced by one member organization to another on a disclosed basis, important responsibilities may fall on the introducing firm but in the view of the Exchange the accounts are actually those of the carrying firm."

Do you agree with that?

A Yes, sir.

Q The next sentence, "This must be clear on the letterhead of confirmations and statements."

Do you agree with that?

MR. GRUTMAN: This is not a subject he either agrees with or not, it is a rule of the Exchange.

THE COURT: I sustain that.

Q Is that consistant with your testimony so far?

MR. GRUTMAN: I object to that.

THE COURT: Sustained.

MR. GRUTMAN: He is marking his own examination paper.

THE COURT: Is that a requirement?

THE WITNESS: Yes.

Q "The Exchange expects the carrying firm to be responsible to the customer for liabilities arising from the account even though the carrying firm by virtue of agreement with the introducing firm may look to the introducing firm for making good on certain types of liabilities."

Now, is that the current position of the Exchange?

MR. GRUTMAN: Objected to, your Honor. This is not proper examination. This is his witness for these purposes and what he is attempting to do is to ask him to give opinions on law or give his own personal views --

THE COURT: I take it this is an exchange advice of some kind promulgated by his employer?

MR. GRUTMAN: The rule which Mr. Mandel got in by stipulation is a rule of the Exchange which governs all member and allied firms and whether the employees of the Exchange like the rule or don't, agree or disagree, it is the rule.

THE COURT: He is just asking whether he understands that to be the rule.

MR. GRUTMAN: He has already told us that. This is just surplusage, your Honor. He examined the rule and said this is the Exchange rule and it is the analogue of the prior rule.

MR. MANDEL: Mr. Fitzgerald said something which surprised me a little bit --

MR. GRUTMAN: I move that be stricken.

THE COURT: As a matter of legal surprise, yes, I understand that.

MR. MANDEL: Under the new rules I have the right, though he is my witness, to try to clear it up and I even have the right to impeach him, if necessary, which I don't think I am doing.

THE COURT: You may proceed.

Q I will repeat this sentence, "The Exchange expects the carrying firm to be responsible to the customer for liabilities arising from the account even though the carrying firm by virtue of agreement with the introducing firm may look to the introducing firm for making good on certain types of liabilities."

Is this document a current document of the Exchange?

A I don't know for certain, but the philosophy espoused and which you just read is, yes.

MR. MANDEL: No further questions.

REDIRECT EXAMINATION

BY MR. SHAW:

Q Mr. Fitzgerald, what under current Stock Exchange practice and procedure which you are familiar with are the liabilities that a clearing house may, pursuant to agreement, look to an introducing house to make good on?

A It is a matter of the contract between the two firms. It is usually spelled out specifically in the contract.

Q Assuming there is churning in an account and there is a large deficit in the account and the account is the account of an introducing firm which is clearing through a clearing firm, and assuming there is a substantial deficit upon the part of the clearing firm, is that a liability that the clearing firm may look to the introducing firm to make good upon?

A It would depend upon the terms of the contract.

Q Is churning a violation of the rules of the New York Stock Exchange?

A I don't think there is a specific rule that defines churning or says that you cannot churn.

Q Is there a general rule against fraudulent practices?

A Yes.

Q Is churning a violation of the rules of the Securities and Exchange Act?

A I believe so.

Q I direct your attention to paragraph 8 of Exhibit 2 and ask you that same question again, whether under this agreement a large deficit as the result of churning is a deficit that a clearning firmmay look to an introducing firm to make good upon?

MR. MANDEL: Your Honor, I believe that calls for an interpretation of the contract, which may be beyond the expertise of the witness.

THE COURT: Well, I don't know --

MR. MANDEL: I suppose the witness should be asked if he believes he knows what that clause embraces.

(Pause.)

xx (Defendants' Exhibit AA for identification was received in evidence.)

THE COURT: Mr. Fitzgerald, do you have that last question in mind?

THE WITNESS: Yes. I think all this does is mandate that all orders introduced by Gross & Company an accepted by Newburger, Loeb have to be in conformance with the appropriate regulations of the Security & Exchange Act, Federal Reserve Board, Commodities Exchange Administration, the New York Stock Exchange and its clearing house. I won't go any further than that.

Q Assuming that there is a liability as a result of the customer not having sufficient financial backing, sufficient moneys, not being able to pay on a margin account, does that involve the know-your-customer rule?

A It may or may not.

Q Assuming that there is a deficit by virtue of any violation of Rule 504 and 505, is that a liability that a clearing house may look to an originating house to make good upon?

A Again, that would depend on the terms of the contract.

Q I direct your attention to Paragraph 10 of this contract.

A That si a matter of interpretation again. This paragraph only says that the responsibility for compliance with those two rules is the responsibility of Gross & Company.

MR. GRUTMAN: Thank you.

Q Assuming there is a situation where there is a substantial deficit by virtue of churning, not learning the essential facts with respect to a customer, and a situation where a customer's man may have made false statements to a customer to induce him not to sell stock, may have omitted to make statements to the customer regarding his own position and activities with respect to that stock, is that a liability that a clearing firm may under the rules of the New York Stock Exchange or custom and usage or what you are familiar with in this industry, look to the originating firm to make good upon?

MR. MANDEL: Objection, your Honor.

THE COURT: Sustained. There is no support for about half of that hypothetical.

MR. SHAW: No further questions.

THE COURT: Anything further?

MR. MANDEL: Yes, I have something.

THE COURT: Mr. Shaw, I am going to sit until a quarter to five.

Are you ready to go forward with anyone else?

RECROSS EXAMINATION

BY MR. MANDEL:

Q I ask you to look at Paragraph 10 of Exhibit 2 and I would like to read that to the jury and read it out loud, "In connection with Rules 504 and 505 of the Board of Governors of the New York Stock Exchange regarding the opening of accounts, it is hereby agreed pursuant to Paragraph 8 on page E352 of the rules that Gross & Company will learn the essential facts with respect to each of its customers and will give approval for the opening of the account."

Isn't that paragraph limited to the obligation with regard to the opening of accounts rather than surveillance of the account 3 and 4 years later?

A It depends upon the definition of opening of account.

Q Do you have a definite understanding of the meaning of the phrase "-pening of account" in this context or is it am ambiguous thing?

A It is not ambiguous at all. In terms of a margin account, it is a continuous operation. The opening of the account is the initial transaction. In some instances a cash account, where there is no lending of money for the customer but full payment for the securities purchased, every transaction in that account can be considered reopening the account.

Q So that you would say that this Paragraph 10 with relation to a margin account only means the initial transaction?

A That is correct.

Q And you also say that this Paragraph 10 with regard to a cash account may mean all transactions?

A May, or may not.

Q Okay.

MR. MANDEL: That is all.

THE COURT: Anything further.

RECROSS EXAMINATION

BY MR. GRUTMAN:

Q Although you say you are not a lawyer, are you familiar with the Securities and Exchange Act of 1934?

A Yes.

Q Are you familiar with its philosophy?

A Yes.

Q Is part of its philosophy to discourage fraud?

A Yes, sir.

Q Is there any doubt in your mind if an originating broker is the person who commits the fraud he is responsible for it?

A If the originating broker commits the fraud --

Q He is responsible for it?

A Under the philosophy of the 1934 Act, yes.

Q And cannot shift it to anybody else?

A Again, on a philosophical basis, yes.

MR. GRUTMAN: No further questions.

BY MR. MANDEL:

Q None of the questions I asked you were understood by you, were they, as to whether a fraudulent originating broker can shift the responsibility to somebody else? I didn't ask you any questions like that, did I?

A Not that I recall.

to you.

(At the bench.)

THE COURT: I propose that the record show by stipulation of the parties that a letter was sent from Mr. Frank to Mr. Persky under date of February 22, 1971, as Mr. Persky testified; that this was a list that Mr. Persky had been asking Mr.Frank to give him; that included in that list were claims that eventually are included, among other things, in the Finley, Kumble pleading of December 26, 1973.

MR. GRUTMAN: Also included, if your Honor please, in the counterclaims and setoffs asserted by Newburger, Loeb & Company, Inc. against the counterclaims of Gross.

THE COURT: All right, and if we can have such a stipulation --

MR. MANDEL: I so stipulate.

THE COURT: I will exclude this exhibit, because there are a lot of things in here that I think open up areas that are inappropriate to go into.

MR. GRUTMAN: Just so it is clear that every claim asserted is embraced there.

MR. SHAW: This is not to be interpreted as a withdrawal of the offer of that exhibit by Mr. Grutman, in which I join. My position if that it should be received in evidence, but if it is not received in evidence, this is a stipulation we have entered into.

THE COURT: No, no. Mr. Shaw, if you want to do that, I will exclude the exhibit, in y discretion, because of the matters in it that expand this trial beyond all possible bounds.

MR. GRUTMAN: Half a loaf is better than none.

MR. SHAW: All right, I will go along with everybody else.

MR. GRUTMAN: Will your Honor announce the stipulation to the jury?

THE COURT: Did what I read into the record fairly state it?

MR. GRUTMAN: I want to be sure the import of your instruction to the jury is that that document indicated February 22, 1971, from our client, contained all of the claims which were asserted on behalf of the client in counterclaims and offsets in the pleadings in this lawsuit.

MR. MANDEL: Mr. Grutman is rewriting your Honor's statement. I agree to abide by your Honor;s statement, which everybody else has agreed to.

THE COURT: Read back my statement, please.

(Record read.)

THE COURT: We can add, and in the Newburger, Loeb --

MR. MANDEL: Which is the Newburger, Loeb?

MR. GRUTMAN: No, we have our own defense too, Mr. Mandel. We have no counterclaims or offsets --

THE COURT: Is included in the Newburger, Loeb counterclaims and offsets?

MR. MANDEL: And asserted in the reply?

THE COURT: Asserted in the reply.

MR. MANDEL: By the Newburger, Loeb Corporation.

THE COURT: When we finish here I will have Mr. Maire read the first part, and then we will add the other section.

MR. SHAW: What do we do with the approximately 50 exhibits as to which there is a dispute as to relevancy?

THE COURT: I don't know.

MR. SHAW: Are we going to hear argument as to how they are relevant, because that will take a couple of hours?

THE COURT: Can you rest your case subject to my ruling on this?

MR. SHAW: Yes.

THE COURT: This would not necessitate further connection. I have two observations, your Honor, (1) which will bear on this, Judge Ward determined that --

THE COURT: Let me stop you there. We have six people sitting here and should we rest your case, Mr. Shaw, and excuse the jury and send them down for coffee and we will take argument here?

MR. SHAW: I think that is a good idea. They would certainly love to hear the words that we have rested.

THE COURT: Why don't you announce that loud and clear.

(In open court.)

THE COURT: Mr. Shaw?

MR. SHAW: Plaintiff rests its case, your Honor.

THE COURT: Ladies and gentlemen, having brought you into the room for that pronouncement, we must deal with certain matters of law at this time and I will have to excuse you again. It will probably be even as much as a half an hour, ladies and gentlemen.

(Jury leaves the courtroom.)

THE COURT: Mr. Mandel, you have motions?

MR. MANDEL: Yes, your Honor, I have a number of motions.

First, your Honor, Judge Ward ruled that some of our counterclaims were not sufficiently intertwined with the basic churning claims so that there was ancillary or pendent jurisdiction of them, and he says that, therefore, those few counterclaims were to be available here only as setoffs. Those counterclaims, by and large, are the contractual counterclaims where we say the partnership owes us the money.

We say, regardless of everything else, in these causes of action, if the churning claim falls, the partnership owes us money and the corporation owes us money, on a contractual basis, and we have said separately that we are entitled to get back the converted in-kind securities.

I think by this time it is probably clear to your Honor that those claims are in fact intertwined with the plaintiff's case, and intertwined with our counterclaims and intertwined with the counterclaims to the counterclaims, so that there is Federal jurisdiction of those claims, ancillary jurisdiction or pendent jurisdiction.

My brethren have been showing you law during the course of this case that the earlier decision is not necessarily law of the case, and that during the trial or after there have been developments, the trial Judge may take a fresh look, and amongst those authorities they say that the most appropriate time to take a fresh look is when there may be jurisdictional questions.

I submit to your Honor that that is precisely this case. It would be a pity after going through this trial if the churning claim is knocked out and the conspiracy claim is knocked out, to say that this Court doesn't have jurisdiction to determine that the partnership and the corporation owe Mabel and Jeanne their $75,000 each, and that they owe Charles whatever is determined that is owed to him, because all of thise issues must be thrashed out anyway in the trial of the other cases.

THE COURT: Do you have a case going in the State Court covering this?

MR. MANDEL: No. I think that Judge Ward had a too-limited notion of the reach of pendent and ancillary jurisdiction, he did not recognize that these counterclaims could hang on the compulsory counterclaims we were also asserting, and I think by this point your Honor probably sees that all of these things are intertwined and should be decided together.

Now, that ruling, that question, doesn't demand immediate decision, because under Judge Ward's ruling those setoffs must be tried here unless the initial churning counterclaim is dismissed at this point.

If the churning counterclaim should be

dismissed at this point, your Honor will then have to make a ruling as to whether to eliminate those so-called setoffs and go ahead only with the other -- I am clear, right?

THE COURT: Right.

MR. MANDEL: Now I will proceed to my next point.

I have two motions, one to dismiss the case or grant a directed verdict on the churning claim, and the second is the same with regard to the contractual claim.

I will talk first about the churning claim. There are two reasons why Plaintiffs' proof fails entirely on the churning claim. The first is that there is no proof of control in the record, and your Honor asked me for a blockbuster case, and I can't give you a blockbuster case applying to the facts of this case directly, but I think your Honor will accept without further citation of authority those cases related to estoppel, your Honor, and I will get to them -- I think your Honor will accept that without further authority that control is a necessary element of the plaintiffs' case.

When you search this record, your Honor, there is nothing in the record to suggest control except Buckley's testimony that eight out of ten of the transactions were suggested by Jordon.

THE COURT: Let me be very, very blunt about it: Isn't that testimony alone enough to take this case to the jury?

MR. MANDEL: No, and I am addressing myself directly to that point, and the reason is, when the cases that talk about following the suggestions of the representative, those cases say that if most of the transactions were the suggestions of the representative standing alone, that may be evidence that the customer was rubberstamping the transactions and that maybe the representative was factually controlling the transactions.

In this case, we have the most startling evidence that one could have on the subject, it has never been produced in any other case, and it is this: Buckley himself testified that he turned down eight or nine out of every ten suggestions that were made by Mr. Jordon, and he said this over and over again.

So not to waste time, your Honor, what I am saying is that that testimony of Buckley absolutely neutralizes the notion of rubberstamping and eliminates entirely the only scintilla of what might otherwise have been evidence of control, and I won't belabor that point.

THE COURT: I have your point perfectly.

MR. MANDEL: My next point is estoppel. I have shown you two cases, those Warner cases, by Judge Wyzanski, in which somebody brought a churning claim years after a partnership had been dissolved. This is also the case here. Gross & Company was dissolved at the end of 1968, Buckley's trading stops in the middle of '66. You will recall that Buckley immediately consulted Mr. Ryan, in '66, and Ryan consulted an expert to look over the account.

After that, Buckley continued to admit that he owed the money, He received the statements, he made no complaints, he asked for time, and as late as 1969 or '70, he made payments against his debit by bringing stock over from his Merrill Lynch account, and giving it to Newburger, Loeb.

The two Warner cases I have shown you also recite and stress the fact that the plaintiff got statements contemporanrously, knew what was happening, never complained about the statements and rested for years, and that because of that, people changed their positions.

Now I suggest to your Honor that it is entirely clear that Gross & Company, if it had been apprised in 1966, 1967, 1968, that there was some claim that there had been wrongdoing in the account, could have done things differently. Jordon was still a partner, Jordon still had money, other partners were liable, Charles Gross wasn't left there standing alone in the situation, but, most of all, if that claim had been asserted against Gross & Company and Newburger at any time before the first day of '69 and Newburger, Loeb and Gross had had any question between them about that, Charles Gross would not have taken his entire fortune and put it into the hands of Newburger, so that they could later say, "Well, we will wait four and a half years to find out whether you owe us money on the Buckley claim."

What I am saying, your Honor, is that there were substantial changes of position.

I have finished on that point.

Shall I go to the next one?

THE COURT: Tell me just in a nutshell what Wyzanski says.

MR. MANDEL: He says these are also cases of dissolved partnership and years going by and people dying, and the customer has received the statements for years and years and done nothing, and he said in a case like that, even if there was churning, they are estopped and barred by their laches, they are estopped by the change in position.

THE COURT: Is this a factual determination or is this after trial or was this on a motion?

MR. MANDEL: I believe this was after trial, your Honor, but he made the determination as a matter of law. I believe it was not a jury case, but I am not sure of that.

THE COURT: It was a trial and it would appear that it was non-jury.

Let me just say this: Has Newburger, Loeb considered or been aware of Carr against Warner, 137 Fed. Sup.611?

MR. MANDEL: It was in our original summary judgment brief, your Honor.

THE COURT: Nash v. Warner, 137 Fed. Sup.615, where at page -- the Carr case, and the two of them follow one another in the reports, apparently -- in the Carr case, on the very last page of the opinion, Wyzanski would appear to have dismissed as a matter of law on facts, and I use the word "appear" again, to be virtually identical to these --

MR. SHAW: Your Honor, I have not read those decisions, if they are referred to in the memorandum of law, for a substantial period of time, but I believe that counsel at the table have read those decisions.

MR. GRUTMAN: We have them, your Honor. We have the Carr case, which is an old case.

THE COURT: --"cannot recover on the theory of churning, plaintiff was fully apprised of the number and frequency of the transactions, which is so here, and given the exhibits and Mr. Ryan's study"in what, '66, early '67?

MR. MANDEL: '66, I believe.

THE COURT: "She was fully competent to exercise judgment as to whether such a large number of transactions were in her interests."

This speaks of an individual plaintiff, but here we have a plaintiff who has counsel and an expert.

Third, she not only refrained from protesting, which is the case here, because nobody ever told Gross or Jordon or anybody else, "You wronged me." If she in fact by repeated silence under the most frequent reminders in writing fully acquiesced in what they had done for her --

MR. GRUTMAN: Your Honor, there are several distinguishing factors. Judge Wyzanski's opinion, a 1966 opinion, is an older case and appears to be an isolated island in the developing body of law which has since evolved subsequent to that case. The most recent case, The Dzentis case, decided in March of 1964, by the Tenth Circuit, 494 Fed. 2d, page 168, 1974 -- Judge Wyzanski was sitting as a trier of fact in the first instance. We have a jury in this case.

THE COURT: He says that as a matter of law on these facts he won't permit a recovery.

MR. GRUTMAN: The Tenth Circuit reversed in the Dzentis case, saying summary judgment was error. In the Dzentis case, page 172, "Several Courts have held that the mere receipt of confirmation slips reporting the date of any security transaction doesn't in itself provide sufficient notice of the churning activity to alert an investor otherwise unaware that the frequency and volume of such trading might be considered excessive," citing other cases, and then the Court goes on in the following sentence, "In each case, the degree of sophistication of the investor is of course important and it is a question of fact."

THE COURT: Let me read that case, but it seems to me the short answer of Mr. Mandel to that is that here a lawyer of the man's choosing said, "You have been churned." So it isn't a question of the mere number of transactions.

MR. GRUTMAN: There was a suspension, Judge.

THE COURT: That may well be, but I question whether a person can forebear to sue on a churning claim because of a suspension in the stock.

MR. GRUTMAN: They were waiting to see what was going to happen.

THE COURT: At their peril.

MR. GRUTMAN: That doesn't mean by waiting to see if on the reopening the sale of the stock would make up the debit balance that that would dissipate the existence of a cause of action, if one exists.

THE COURT: That may be, but the waiting, if Gross changed position, the waiting to see whether they have to pay Newburger, Loeb some money may be at the cost of losing Gross & Company.

MR. GRUTMAN: I must say, your Honor --

THE COURT: A good reason for waiting doesn't necessarily bind the defendant being sued here. I have your point and that had occurred to me.

MR. MANDEL: May I say one thing in response?

MR. GRUTMAN: Before Mr. Mandel interrupts --

THE COURT: Well, I permitted you to interrupt him.

MR. MANDEL: This case is not based on Buckley's losses, it is based on churning and whether you make money or not, the account can still be churned. Waiting to see if Westec comes back is utterly irrelevant.

THE COURT: It is a motive for waiting, but it may well be he waited at his peril.

MR. MANDEL: I have another point to make: As a matter of law I think it is now established in this case that both the clearing house and the originating house are responsible to the customer and there is no way that that can be avoided.

THE COURT: That is true. There is no question about that. We had some testimony yesterday as to the priority of responsibility, but there is no question that both are responsible.

MR. GRUTMAN: That may be as to the customer, Judge.

THE COURT: That is what he said.

MR. MANDEL: As to the customer. That means that if churning occurred, both are joint tortfeasors and the really terrible thing that Persky did, in my opinion, is not to make a claimover, not to say "We want some indemnification," not to do this or that, which would be the normal thing to do, but to take an assignment to put Newburger, Loeb in Buckley's shoes and try to make a profit out of that situation.

The law has always been clear, and the authorities are there in my brief, that a joint tortfeasor may not take an assignment of the claim from the victim to sue another tortfeasor. There may be a right to indemnification, there may be a right to --

THE COURT: Are you saying to me that Newburger, Loeb has no standing here as the plaintiff? Is this the bottom line?

MR. MANDEL: Yes.

THE COURT: You are attacking their standing as plaintiff?

MR. MANDEL: Yes. That the assignment went to a joint tortfeasor, which is not permitted by law. The assignment went first to the partnership and then to the corporation and that assignment was an assignment which is prohibited by the doctrine against joint tortfeasors trying to make a profit. The Courts have condemned that as immoral. That is so well established that you never hear of anybody trying something like that, except Mr. Persky who is so remarkably creative, and I will now halt the emotionality of a peroration.

I say there are three reasons each of which independently require the churning claim to be dismissed:

(1), no control;

(2), estoppel;

(3), the joint tortfeasor doctrine.

THE COURT: The joint tortfeasor doctrine resulting in a disability on the part of Newburger, Loeb to assert this claim because the law prohibits their receiving it? Is that what you are saying? If the law prohibits their receiving it, the assignment is void and they have nothing upon which to sue?

MR. MANDEL: Yes. The cases are there in the brief, your Honor.

Now, we get to the contract case, which your Honor provisionally let in, and I saw that should be dismissed also. You remember that there was a motion brought right at the start of the trial --

MR. GRUTMAN: Can we address ourselves to these arguments --

THE COURT: Let me hear this. This is a breach of the clearing agreement?

MR. MANDEL: Right, the breach of the clearing agreement, based on churning.

If your Honor knocks out the churning cause of action, the contract cause of action must go too.

The next thing I have to say about the contract case is that your Honor gave me leave to point out later that it should not be allowed to come in at this moment, at this last moment of the trial. I think my friends bought it into the case at the last moment because they were aware of the import of the joint tortfeasor doctrine.

The reason it should not have been alllowed in now is that the contract breach occurred, if at all, if there was churning -- it stopped in 1966. This is now 1975. They are trying to sue in an entirely different capacity and evade the statute of limitations, because this is not a different kind of claim of a variation of the original claim of the corporation. The original complaint is brought in Buckley's shoes; the contract cause of action is brought in the shoes of the partnership and the contract cause of action became barred six years after 1966.

There is an additional and equally compelling reason why as a matter of law the contract -- two more reasons -- the contract cause of action must be dismissed.

The contract cause of action not being derived from Buckley has a different measure of damages. The contract cause of action is one in which the partnership says, in effect, "We were damaged by Gross & Company's churning of Buckley."

Assume that Buckley was churned, there is nor proximate relationship between the loss covered by Newburger, Loeb in the Buckley account and churning. They always had sufficient margin.

Buckley has never recovered a churning claim against them and never will. The loss in the account, the loss of the debit balance, occurred for one reason, your Honor, and one reason only, the collapse of Westec, which was an external event. Until Westec collapsed, everything that Buckley owed was covered adequately by margin.

So that the loss under the contract claim did not result from churning, but resulted from something else, it resulted from the collapse of Westec,Buckley's lack of independent assets, and perhaps from the settlement which Mr. Persky made, perhaps improvidently, but getting back to my starting point -- I don't want to make it complicated -- I say there is no proximate relationship between any loss and the contract.

Finally, it is up to your Honor to interpret -- no, this I odn't think is a matter for summary judgment. I hope I have not taken too long.

THE COURT: No, you have not. You have conducted yourself entirely appropriately and communicatively.

Thank you very much.

MR. SHAW: Your Honor, in my opinion there are substantial issues of fact with respect to the churning claim, with respect to the defense of estoppel, are a big boy. You are not a little old lady."

THE COURT: I remember that, yes.

MR. MANDEL: And so in '6[illegible] Ryan is telling Buckley he has no churning claim, and again in '69 they are acknowledging the indebtedness by paying stock against the debit, and that is the state of the record, and if estoppel applies here, and I believe it does, the record clearly upholds it.

THE COURT: I am going to reserve decision at this moment.

We will take a recess for about ten minutes --

MR. GLATZER: Your Honor, you said you wanted to hear argument on the other motion.

THE COURT: I will pass that at this particular moment.

(Recess.)

(In open court; jury present.)

THE COURT: Mr. Mandel, you may proceed.

SAUL BERKOWITZ, called as a witness by the defense, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MANDEL:

Q Mr.Berkowitz, will you please state your profession?

A I am a certified public accountant in the State of New York.

Q Duly licensed as such?

A Yes.

Q How long have you been practicing that profession?

A Thirteen years.

Q Are you a member of an accounting firm?

A Yes, I am a member of the firm of Clarence, Rainess & Company.

THE COURT: Ladies and gentlemen of the jury, just so there is no question about it, we have now proceeded to the case on behalf of Charles Gross, Mabel Bleich, Gross & Company and Jeanne Donoghue, and these witnesses are proffered on that part of the case before you.

Q I show you Defendants' Exhibit B for identification. Have you seen that before?

A Yes.

Q Have you made certain studies and computations from that document?

A Yes, I have.

Q Will you tell the jury what Exhibit G is?

MR. MANDEL: May I, your Honor?

THE COURT: It is in evidence. You tell them what it is.

MR. MANDEL: It is the Buckley account.

Q I show you Defendants' Exhibit D for identification. Is that a document which you prepared?

A Yes, it is.

Q Did you prepare it from Exhibit --

MR. SHAW: No objection to D, your Honor.

MR. MANDEL: I offer it in evidence.

THE COURT: I think there should be some foundation here as to from when it sprang.

Q Did you make it up from the information in Exhibit B?

A Yes, I did.

Q Will you explain to the jury what Exhibit D is?

A Exhibit D is a graph showing the Buckley account, showing the equity in the Buckley account and the invested capital in theBuckley account. By the term "equity," the line which shows the equity is the total market value of the securities in the account, less the amount of money that the Buckleys owed to the broker as margin.

The invested capital line is the value of the securities and the amount of cash put into the account less the value of securities or money withdrawn from the account.

Q Does that graph run over a time period?

A It runs from June of 1962 through August of 1966.

Q And it has a blue line and a red line?

A That is correct.

Q And the blue line --

A That is the equity line.

Q Which is the total value of the --

A I have just described that.

THE COURT: He has described that, Mr. Mandel.

Q If you subtract the number along the red line from the number along the blue line at any moment --

A That would give you the total profit in the account.

Q Profit in the account at that moment?

A At that moment.

Q And where the blue line is below the red line, that tells you what?

A There there is a loss in the account at that moment.

THE COURT: It may be received in evidence, there being no objection.

xxx (Defendants' Exhibit D was received in evidence.)

MR. MANDEL: Your Honor, you have a blowup of this exhibit. May I pass it to the jury?

THE COURT: You may.

MR. MANDEL: May I pass another copy, too?

THE COURT: Yes.

(Documents handed to the jury.)

MR. GRUTMAN: Do we understand when the word "profit" is used that means paper profit?

THE COURT: I will permit you to inquire as to that later.

(Pause.)

Q Mr. Berkowitz, I call your attention to two sharp peaks in the blue line on Exhibit D and I ask if you can give an explanation of when and why those peaks occur.

A The peaks occur first in December of 1963, at which the dollar amount peaks at approximately $520,000, which indicates that that was the equity in the account at that time.

Q Do you remember any particular security that was associated with that peak?

A I believe it would be the market value of the Westec stock which was in the account.

MR. SHAW: In December 1963.

Q Syntex?

MR. GRUTMAN: He said Westec.

A Without referring to my notes, I don't recall.

Q Can you refer to your notes?

MR. SHAW: I think we can stipulate that it is probably Syntex that this witness is referring to.

THE COURT: All right.

Q Do you happen to recall any security associated with the second large peak?

A The second large peak occurs between March and June of 1966 and the peak is at approximately $580,000, and I believe that that was the Westec stock, market value of the Westec stock.

Q During this entire period what was the largest amount of Mr.Buckley's own money which was invested in this account?

A The largest amount of invested capital in the account at any one time was approximately $320,000, or $240,000, excuse me, in approximately September of 1965.

Q On August 25th of 1966, how much of Mr. Buckley's invested capital was left in the account?

A Approximately $110,000.

Q I show you Exhibit DD for identification and I ask you what that is.

A This is a graph of the gross and net equity in the Buckley accounts. The black is the inventory value --

MR. MANDEL: May I pass copies to the jury, your Honor?

THE COURT: It has to be received in evidence.

A The black line is the inventory value of the account and the red line is the money debit, the amount of money which the Buckleys owed to the broker as margin.

The net of the two numbers would be the equity which we were referring to in the last exhibit.

Q Did you make up this chart, DD, from Exhibit B also?

A Yes.

Q When you say the inventory value of the account, do you mean by that the market value of all the securities in the account, from moment to moment?

A That is correct, the market values of the securities in the account being correct.

Q When you say the money debit, do you mean the amount owed to the broker on margin?

A That is correct.

Q From time to time. Would it be true to say that the differences between --

MR. GRUTMAN: Could we have the witness testify, your Honor, rather than Mr. Mandel? It is quite leading, I think.

MR. MANDEL: It is, but it is harmless leading, under the rules, I think.

THE COURT: Let me see the exhibit, please.

Are you going to offer it in evidence?

MR. MANDEL: Yes.

THE COURT: Why don't you offer it in evidence?

MR. MANDEL: I offer it in evidence.

(Pause.)

THE COURT: Mr. Berkowitz, the points for the graph on DD are drawn from Exhibit B, is that correct?

THE WITNESS: That is correct. They are just a slipup of one of the lines on Exhibit B.

MR. MANDEL: That is not quite right, your Honor.

MR. SHAW: Your Honor, could we have a moment? Exhibit D we saw before, but we have never seen DD before, and we are trying to understand what it is about and we might have an objection, and we may not have an objection, but could Mr. Mandel just not ask a question for a moment?

THE COURT: All right.

(Pause.)

MR. MANDEL: I think your Honor might want to compare these, because that is significant too (handing).

MR. GRUTMAN: Your Honor, there are two objections to Exhibit DD. Number 1, Exhibit DD apparently stops too soon, it stops in August of '66, and doesn't show the loss sustained. So it is an incomplete document.

Secondly, we fail to see what the relevance of this is to the churning claim.

MR. SHAW: May I be heard, your Honor? It seems to me where an expert or an accountant is proffered to testify with respect to a summary of detailed, complicated, thick records, that the summary should be complete, and where the summary stops at a certain point it is misleading and should not be received in evidence. All the records should be summarized, not just ones favorable to a certain position.

THE COURT: This last date, Mr. Mandel --

MR. MANDEL: I think that is the date the world came to an end in trading stock on Westec.

THE COURT: That objection I find to be without merit. Exhibit D went in subject to the same alleged flaw without comment.

MR. GRUTMAN: It was not realized at that time, your Honor.

THE COURT: The first objection is what?

MR. GRUTMAN: I don't see the relevance of this as to any churning claim or any defense on the churnir claim.

THE COURT: I will overrule that objection.

Exhibit DD is received.

xxx (Defendants' Exhibit DD for identification was received in evidence.)

MR. MANDEL: May I show copies to the jury?

THE COURT: You may.

MR. MANDEL: Perhaps I should ask a few questions about it first.

I believe I was asking about the meaning of inventory value and I don't think I got an answer.

Q What do you mean when you say "by the inventory value of the account"?

A The inventory value of the account at any given point on the graph is the total market value of the securities in the account without giving effect to what amount of margin may be owed against them.

Q In calculating inventory value, did you just take the stocks in the account and go to the newspaper and multiply it out to get inventory value?

A That is correct.

Q And that is the black line on DD?

A Correct.

Q So that the black line would show the value of the account if nothing was owed on it, right?

A That is correct.

Q And the red line underneath it shows what is owed on margin from time to time?

A That is correct. It shows at any given point how much the margin debit was, how much money was owed to the broker against the market value of the securities.

Q And if you subtract the difference between the red line and the black line --

A You would come to the equity in the account?

Q What the Buckleys would own and take hom if they sold everything that day?

A That's correct. The equity is really the net ownership of the Buckleys in that account.

MR. MANDEL: May I show these exhibits to the jury?

THE COURT: You may.

(Pause.)

Q I call your attention to the second page of Exhibit D --

MR. MANDEL: I should explain, your Honor, that the second page was not passed around with the first page, but it is already in evidence.

THE COURT: Yes.

Q Will you explain what the second page is?

A The second page is a schedule showing the ratio of the capital turnover to the equity in the account and the term "equity" has already been defined as the net value, the net ownership in the account of the Buckleys. The capital turnover is the volume of the purchases and sale transactions. The schedule is done on a quarterly basis and it shows, on a quarterly basis, ratios of from less than a 1:1 basis, or substantially less than a 1:1 basis, up to a maximum of a 5.4:1 basis.

Q In examining the account and working out the capital ratio turnover, did you reach any opinion on the effect --

THE COURT: Gentlemen,please do not stand during the pendency of the question. I appreciate you are going to object --

MR. GRUTMAN: Will the witness withold an answer, your Honor?

THE COURT: Yes. Put the question again.

Q In examining Exhibit B, and in working up your calculations of the capital turnover ratio, did you reach any opinion as to the effect of margin borrowing on the capital turnover ratio?

A Yes, I did.

Q What was that opinion?

MR. SHAW: Objection, your Honor.

THE COURT: Overruled.

A The use or the availability of margin in the account increases the buying power in the account and, therefore, can increase the amount of the capital turnover in the account. The amount of purchases and sales that could be effected because of the extra added borrowing power, which in effect that is what the margin is, is the borrowing power -- by having this borrowing power with a lesser amount of your own money, you can buy greater amounts of securities.

Q Did you also reach an opinion with regard to the use of calls?

A Yes, I did.

Q On the capital turnover ratio?

A Yes, I did. I think I should first explain what a call --

MR. SHAW: I would like to state my objection again for the record, your Honor.

THE COURT: Overruled.

A A call transaction is one whereby for a nominal amount of money an investor may buy an option on a particular stock. For example, he might take American Telephone & Telegraph Company and for $500 be able to buy that stock at today's market price, any time within the next three months, as he chooses, even if the prices goes from 50 to 100, because of the purchase of the call for $500, he would be able to buy the American Telephone & Telegraph stock for $50 a share at any time within the next three months, if that is the nature of that particular option.

Q If he exercises that option and sells the stock immediately, what is the effect of that on the capital turnover ratio?

A It creates additional capital turnover, because we have a purchase and an immediate sale when there was never any real intention to hold the stock; all that there was an intention to do was to make money on the $500 investment, make a couple of hundred dollars or, perhaps, some larger amount, on the $500 investment, but it may entail the purchase of $5000 worth of stock and the sale of $5200 worth of stock.

In many cases, the value of the call option at the time of its expiration is such that there is somewhat of a profit in the option and it is meaningful for the investor to actually exercise the option and sell the stock immediately because, as I stated before, he might be able to buy it at 50, the option price, and sell at 52, and he would have a $200 profit, and he had paid $500 for the option and he would have had a $300 loss in the transaction, but it would have involved purchases and sale or capital turnover volume of $10,000.

Q In that case, in your example, roughly --

A There would be a tremendous capital turnover ratio as a result of that.

Q Did you find such transactions in the Buckley account as you examined Exhibit B?

A Yes, I did.

MR. MANDEL: Your witness.

MR. GRUTMAN: No questions -- oh, yes, wait a moment.

(Pause.)

CROSS-EXAMINATION

BY MR. GRUTMAN:

Q Mr. Berkowitz, do I understand that by profession you are an accountant?

A A certified public accountant.

Q Certified public accountant? Do you hold yourself out to be a specialist in the securities laws of the United States?

A Not in securities laws. We have done --

Q That is an answer, sir.

THE COURT: I didn't hear an answer.

A We have done a substantial amount of accounting work in the securities industry.

Q You have done work as an accountant doing accounting work for clients who may be in the securities industry?

A That is correct.

Q By the way, among those clients have there been Mr.Charles Gross?

A Yes.

Q How many years have you on behalf of Charles Gross served as an accountant?

A He has been a client of our office since I started working there, 13 years.

Q Did you ever have an association with an accounting firm other than the Clarence, Rainess office with which you are presently connected?

A I was with a firm, or there was a firm which merged into Clarence Rainess, Simonson, Peyser & Citrin.

Q Were they at one time the accountants for Gross & Company?

A That is correct.

Q Would you tell us whether at any time Simonson, Peyser & Citrin ever did any work for Newburger, Loeb?

A We did.

Q Was that at the request or instance of Mr. Gross?

A Among others, yes.

Q Did you do that at a time when Mr. Gross was the managing partner of Newburger, Loeb?

A We did.

Q I come back to my earlier question. Irrespective of the nature of the kind of people your firm has done accounting work for, do you hold yourself out personally to be an expert in the securities laws of the United States?

A No.

Q Have you ever been employed as a securities analyst?

A No.

Q Have you ever been employed as a consultant about securities transactions from a securities standpoint rather than accounting?

THE COURT: I think you have your cart here before your horse, and the horse has already gone down the street.

RICHARD MILES, called as a witness by the defense, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MANDEL:

Q What is your present employment, Mr. Miles?

A I am employed with Merrill Lynch, Pierce, Fenner & Smith.

Q Is that a brokerage frim?

A Yes.

Q Is it one of the largest brokerage firms in the world?

A Yes, I would say it is.

Q What is your position there?

A I am a vice-president and director of the law and compliance division.

Q How many people work under you in the law and compliance division?

A Approximately 95.

Q How many of those are lawyers?

A Approximately 40..

Q What are the rest of them?

A Professionals in the compliance area and clerical people, secretaries, and what have you.

Q Would you please describe what compliance means, in general terms?

A I would say it was an effort on the part of any business to make sure its operations are in fact in accordance with applicable laws, regulations.

Q With regard to the securities industry, what does compliance entail?

A It entails essentially the conduct of customer accounts in the brokerage business, in full accordance with the Securities Act of 1934, 1933, the rules of the various self-regulatory bodies and also, to a degree, various house rules which are directed to credit considerations and what have you.

Q How long have you been employed by Merrill Lynch?

A Approximately four and a half years, since December of 1970.

Q Before working at Merrill Lynch were you employed in compliance work elsewhere?

A Yes. From 1960 through 19 -- until the beginning of 1969, I was employed with Francis I. duPont & Company. My last position there was manager of their compliance and legal department.

Subsequently I was employed for a year with

Newburger, Loeb & Company as director of compliance.

Q During what period?

A December 1969 through the end of November 1970.

Q What is your educational background, sir?

A I have a BS and a law degree -- BA, excuse me, from Williams College.

Q And your law degree is from?

A Yale University.

THE COURT: Are you admitted to the bar, sir?

THE WITNESS: No,I am not.

Q Did there come a time while you were director of compliance at Newburger, Loeb & Company that you became familiar with the Buckley matter?

A Yes. One of my responsibilities was to pull together various collection items and move them along, and I would say probably in January or February of 1970 I became aware of the deficit position in the Buckley account.

Q How did you become aware of this, if you recall?

A I don't recall precisely. I was either advised of it by people within the firm or was on a list of deficit accounts I was pulling together. This was a new position and I was pulling together a variety of different files from partners of the firm.

Q Who was in charge of the Buckley file at that time, if you know?

A Prior to my taking the offer, it was Mr. Leo Stern.

Q Who was Leo Stern?

A He was a general partner in the firm.

Q General partner of Newburger, Loeb & Company?

A That's right, yes.

Q Did you have any discussions with him about the Buckley situation?

A Yes, I did. He was not regularly at work, there was some difficulty in getting to see him, but I would say some time in February or March I did see Mr. Stern and he turned his file over to me.

Q Did you have a conversation with Mr. Leo Stern about the file at that time?

A Yes, I did.

Q What was the substance of the conversation?

MR. SHAW: Objection, your Honor.

THE COURT: On what ground?

MR. SHAW: Upon the ground of hearsay, also attorney-client, nobody else was present and Mr.Stern is dead.

THE COURT: This is a statement of a party and this gentleman is not an attorney.

Any other objection?

MR. GRUTMAN: I object on the ground it is not binding on Finley, Kumble, that we were not present.

THE COURT: I would concede that is so at this time. I will take it subject to connection with Finley, Kumble, if any, but it is admissible against Newburger, Loeb, without any question.

Overruled.

Go ahead.

A Well, Mr.Stern, amongst other records turned over to me an unverified statement,personal statement,from Mr. Buckley and his wife, indicating that they had rather limited assets. That had been given to Mr.Stern --

MR. SHAW: Objection, your Honor. I believe the question was what was the conversation and now we are getting transactions. Could we have the conversation?

THE COURT: REad the answer back, as far as it has gone.

(Answer read.)

MR. SHAW: I move to strike, your Honor, because it is with reference to a document not being produced.

MR. MANDEL: It is already in evidence, Exhibit 32 --

THE COURT: I overrule the various objections.

You may continue.

Q Let's start again. You were talking to Mr. Stern --

A He turned over the file and made reference to this personal statement. He indicated that he had received it from Golenbock & Barell, that in connection with submitting that statement he said Mr. Buckley's attorneys had made an offer of $25,000 plus the equity that was in the account. We discussed that and agreed it was a fairly modest offer in terms of the money he owed us and there was some question of whether we should look into Mr. Buckley's personal situation, further, to verify if the statement was accurate or whether he was in fact judgment proof, and Mr. Stern also told me he understood Mr. Buckley's father was very wealthy and there was some consideration given by both of us to the possibility that his father might make a contribution to a settlement to avoid personal bankruptcy.

Q I show you Exhibit 32 in evidence, and ask you if these papers are copies of the papers that Mr. Leo Stern showed you at that time.

A Yes, I believe this is a copy of the statement.

Q Did you also see the letter of transmittal at that time from Webster, Sheffield, which is part of P32?

A Yes, that was in the file.

Q Did you have a discussion or did Mr. Leo Stern say anything to you or did you say anything to Mr. Leo Stern about --

MR. SHAW: Objection, your Honor. This is leading.

THE COURT: He has to focus his attention on something, I assume.

MR. SHAW: I think the witness should be asked whether that is the substance of the conversation he had, without asking specific questions about a conversation five years ago, which is probably one of hundreds that he had with this person.

THE COURT: Do you have a memory, Mr. Miles, of that conversation with Mr. Stern?

THE WITNESS: Yes, I do.

THE COURT: Tell us everything that you said and that he said and when we are through with that we will see whether we need to go any further.

A I raised the question of, you know, brought up the fact that we had not liquidated the securities in the account, and we talked about whether it would be advisable to reduce the claim to a straight money claim by liquidating now.

Mr.Stern told me that the decision not to liquidate the Westec stock when Westec commenced trading, approximately a year earlier, I believe,,had been Mr. Stern's decision and he had done so at the request of Mr. Buckley.

This gave me some concern and I expressed that --

MR. SHAW: I move to strike "concern."

A I expressed my concern because I told Mr. Stern that I felt there was case law around to the effect that this might be a setoff which Mr. Buckley could use with respect to our claim for the debit balance. In other words, the value of the securities, if in fact Newburger, Loeb had liquidated promptly after reinstatement of trading, and that was more or less dismissed in our conversation because even if we had allowed the setoff, there still would have been a major settlement if Mr. Buckley had made up the difference and we were really focusing on the question of, you know, whether in fact he was a judgment-proof debtor and we should give serious consideration to the $25,000 offer. It was agreed that I would follow up, and I took the file.

Q Do you happen to remember about what the size of the debit was at that time?

A I think it was in the high $300,000 or maybe

400,000. It was substantial. I am not sure exactly.

Q This was one of a number of matters you were handling at that time, is that correct?

A That's right.

Q At that time, when you first spoke to Mr. Leo Stern and looked at the file, was there anything in the file to indicate that Mr. Buckley was making any claim of wrongdoing?

A No.

Q Did Mr. Leo Stern say anything to you about such a claim?

A No, no claim of wrongdoing. We discussed the possible setoff because of a failure to liquidate, that is all.

Q What is the next thing that happened with regard to this Buckley matter?

A The next thing I recall is a conversation with Mr.Arthur Silverman, our counsel, Golenbock & Barell, probably some weeks later.

Q What was the substance of that discussion?

MR. SHAW: Objection, your Honor, hearsay. I also believe Mr. Silverman is in court and available to testify as to what he did and what he said.

THE COURT: Overruled.

A Well, as I recall, we discussed the account in general, there was some thought of how we should pursue, whether we should liquidate the securities, reduce it to a straight money claim, whether we should pursue in court or in arbitration.

I believe it was at that discussion or at another discussion soon thereafter that a decision was made that we go ahead with arbitration proceedings, notwithstanding the fact that he might object, but we would go ahead.

Q Did you have any conversations with Robert Stern about the Buckley account at some point?

A I am sure I did, because I was reporting to Mr. Robert Stern at that time.

Q Who was Robert Stern?

A Another general partner of the firm.

Q Was he related to Leo Stern in any way?

A He was his son, I believe.

Q Can you recall the substance of any conversation you had with Robert Stern about the Buckley account?

A Not specifically. Mr.Stern was urging me to proceed as rapidly as possible in collection efforts with respect to a number of different accounts, and I am sure the Buckley account was one of those mentioned, but I don't have a specific recollection.

Q Did there come a time when you had a conversation with Arthur Silverman regarding the arbitration?

MR. SHAW: Same objection, your Honor.

THE COURT: Overruled. The objection is to hearsay?

MR. SHAW: Yes, your Honor.

THE COURT: It is overruled.

A Well, I am sure that he told me that being that the submission to arbitration was being prepared and when it was served -- it was some time that summer --

Q Did you direct and authorize Mr. Silverman to commence arbitration?

MR. SHAW: Objection, your Honor, to the leading.

THE COURT: I will sustain the objection.

Did you have a conversation with Mr.Silverman about arbitration?

THE WITNESS: Yes.

THE COURT: What did you say to him and what did he say to you?

THE WITNESS: There were a number of conversations. I authorized him to proceed with an arbitration action against the Buckleys. From time to time he would advise me of how things were going, it had been served, and then he eventually advised me and sent me a copy of the response.

THE COURT: Mr. Mandel, it is almost one o'clock. Is this as good a time as any to recess?

MR. MANDEL: Yes, sir.

THE COURT: We will stand in recess until two o'clock.

(Luncheon recess.)

AFTERNOON SESSION
2:00 P.M.

(In open court; jury present.)

RICHARD MILES resumed.

DIRECT EXAMINATION (continued)

BY MR. MANDEL:

THE CLERK: You remain sworn, Mr. Miles.

Q Mr. Miles, going backward in time, did there come a time when Mr. Silverman requested you to prepare in connection with the proposed arbitration a summary of the status of the Buckley account at various times?

A Yes, Ibelieve there was.

Q I show you Exhibit P22, which is in evidence -- I show you a copy of it -- and ask if you recognize that?

A I can't say I specifically recognize it, but I see what it is and it may well have been prepared by my assistant.

THE COURT: All right, he can't recognize it. It is in evidence?

MR. MANDEL: Yes.

Q Did there come a time when the answers set off in counterclaims asserted by David and Mary Buckley in the arbitration were brought to your attention?

A Yes.

Q Who brought it to your attention, do you recall?

A I am sure it was Mr.Silverman.

Q I show you a copy of Exhibit P28 in evidence and ask you if you recognize it.

A This is the answer to our submission in arbitration.

Q An arbitration is a proceeding which may result in a judgment, is that right?

MR. GRUTMAN: Objection.

THE COURT: What is the basis of the objection?

MR. GRUTMAN: One, arbitrations end in awards which may be confirmed by judgment in a separate legal proceeding and, secondly --

MR.MANDEL: I will accept that and withdraw the question.

MR. GRUTMAN: Secondly, as I understand --

THE COURT: The question is withdrawn.

MR. MANDEL: I stipulate that Mr.Grutman's statement is right, that an arbitration ends in an award which may be confirmed by a judgment.

MR.SHAW: If you win?

MR. MANDEL: That is right.

THE COURT: All right, that is so stipulated.

Q As part of your duty and your position for the firm, was it incumbent upon you to evaluate the setoff and counterclaims of the Buckleys?

A Yes, I would say it was.

Q For what reason was it incumbent upon you to make such an evaluation?

MR. GRUTMAN: Objection, your Honor.

MR. SHAW: Objection.

THE COURT: No, I assume it is a question of whether it is within his duties.

MR. GRUTMAN: It is asking for the reason, and that may be the operation of somebody else's mind or conclusion or inferential judgment he is making.

THE COURT: I assume that is one of the specified duties assigned to him.

MR. GRUTMAN: That he answered in the prior question. Now he is asking, "What is the reason where it is one of your duties?"

THE COURT: I will overrule that objection.

Go ahead.

A Well, there was no written job description, but as director of compliance, I was given to understand I was responsible for collections and counterclaims that degeloped from collection efforts and generally responsible for legal matters, relations with outside counsel, and in this capacity I would advise the partners as to what we should do.

Q Did you in fact make such an evaluation of the Buckley setoff and counterclaims? The question is, did you make such an evaluation?

A Yes, I did.

Q Specifically, did you make an evaluation of the Buckley churning counterclaim?

A Yes.

Q What evaluation or judgment did you reach on the Buckley churning counterclaim?

MR. SHAW: Objection.

THE COURT: On what ground?

MR. SHAW: He is merely testifying as to his state of mine or opinion back in 1970, without any testimony that he communicated this to any persons. Therefore, he is giving an opinion that he had at a certain time and I don't believe that his opinion as of this point is admissible upon the ground that there has not been a sufficient foundation established. It has not been established what facts he had, what basis he had to make such an opinion --

THE COURT: I will permit you to cross-examine on that.

Overruled.

Q What opinion did you reach of the Buckley churning counterclaim?

A My opinion was that it was without merit. My initial evaluation was that the counterclaims were tactical in nature, with a view to putting Mr. and Mrs. Buckley in a better bargaining position, that you can expect this type of tactic regularly when you go into collection proceedings with respect to a speculative account.

We did look at the turnover, got a rough estimate of what it looked like --

THE COURT: "We" is whom?

THE WITNESS: Well, I had an assistant.

MR. SHAW: I move to strike everything after his statement that he had an opinion that it was without merit. The rest was just a speech upon his part and not responsive to the question as to what his opinion was.

THE COURT: No, it may stand.

Q Will you please continue your answer?

MR. MANDEL: Mr. Reporter, could you read back the last few words?

(Record read.)

A -- and under the circumstances and as I understood them, the information that had been given to me about Mr. Buckley and about how he operated his account and the history of the events that led up to the collection proceeding, I came to at least a preliminary conclusion that the claim was without merit. However, Mr. Silverman and I both agreed it would make sense to interview Mr. Jordon subsequently --

Q May I interrupt, please? I don't want to go forward --

MR. SHAW: I object to that, your Honor.

THE COURT: We don't need any colloquy. Just put your next question.

Q You mentioned the history of the account. Will you recite what you meant by that?

MR. SHAW: Objection.

THE COURT: Overruled.

A It was my understanding that the account had been an active-trading account for a number of years, that Mr. Buckley had made a great deal of money at one time in Syntex, common stock of the Syntex Corporation, that he had written that stock down when its price deteriorated somewhat, that he had run up significant paper gains in Westec prior to the suspension of trading. I had some information about Mr. Buckley's background, that he was a young man, had a good job with a household name, that he was well-educated, that he called the shots himself, and made his own decisions and that it was his avowed intention to speculate to try to make as much money as he could.

Q Did you have information about what had been happening with the account between 1966, when Westec collapsed, and 1969 or 1970?

A Well, of necessity, matters were more or less in suspension, the Westec suspension was terminated and started trading again. Mr. Stern told me it was at Buckley's request that he decided not to liquidate. It was apparent from the record that Mr.Buckley had subsequently deposited further securities in the account.

Over this entire period there had been no allegation of any churning claim. Our contacts heretofore with his counsel had been purely with respect to arriving at some sort of settlement in line with his ability to pay, not in line with any counterclaim, and it was only after we had decided to push for full collection that we heard about this, and initially interpreted it as a tactical move.

Q Did you communicate your judgment of these counterclaims to anybody in the partnership?

A Oh, yes, certainly to Bob Stern. I reported to him regulardly.

Q What did Bob Stern say to you when you gave him your conclusion or judgment?

A He agreed.

Q Did you communicate with Mr.Silverman thereafter?

A Yes.

Q What instructions did you give Mr.Silverman?

A That we would proceed with the collection.

Q Did there come a time when you and Mr. Silverman decided to speak with somebody else about the history of this matter?

A Yes. We had agreed all along that at some point it would make sense to talk to the registered representative who handled the account and interviewed him with respect to, you know, what he had to say about the account, what kind of a witness he would make, in case that was necessary.

Q Do you remember the name of that man?

A Charles Jordon.

Q Did you meet with Mr.Jordon at some point?

A Yes, I did, some time in September.

Q September of 19 --

A '70.

Q Who arranged that meeting?

A Mr.Gross.

Q At whose request?

A I believe it was at my request.

Q Where did the meeting take place?

A In Mr. Gross' office.

Q Where, at Newburger, Loeb?

A At Newburger, Loeb.

Q Who was present besides you and Mr. Jordon and Mr. Gross, if anybody?

A Mr.Silverman.

Q What happened at that meeting?

MR. SHAW: Objection to any statements made by Mr. Jordon at the meeting, your Honor.

MR. MANDEL: Your Honor, this was information --

THE COURT: I am going to admit it. Statements by Mr. Jordon will be admitted for the fact that they were made at the meeting.

MR. MANDEL: To the partnership?

THE COURT: To the partnership, but not as part of the underlying facts, but merely that Mr. Jordon made these statements at that time.

You may answer, sir. What happened at that meeting?

THE WITNESS: Mr. Jordon related what he could remember of the history of the account. As I recall, there was nothing in there that changed my -- that was contrary to the prior information we had received. I believe Mr.

Jordon mentioned at one point that Mr. Buckley received investment subscription services regularly, that he had taken a course in securities evaluation, and then there was a good deal of narrative essentially in support of the fact that he was an avowed speculator who wanted to trade aggressively and on a leverage basis to make as much money as he could and that he often argued with Mr. Jordon about his recommendations and made all his own decisions.

Q Did you know whether or not the account was a discretionary account?

A I assumed that it was not a discretionary account. There was certainly no discretionary agreement in the file and Mr. Jordon was perfectly clear on the point that there was no discretion whatsoever.

Q Did there come a time at the end of this discussion when you and Mr. Silverman spoke privately after you had left Mr.Gross and Mr.Jordon?

A Yes. I believe we either went back to my office or talked in the hallway. Generally, Arthur was on his way back uptown and we more or less confirmed our joint opinion that we had not learned anything that gave us any reason not to pursue the collection aggressively.

Q Was there any conversation about Gross & Company?

A Yes. Arthur raised the possibility of more or less protecting ourselves by claiming over against Jordon and Gross & Company. As I recall, my reaction was that that would be a very bad mistake, because it lent credence to what I felt was essentially a frivolous counterclaim.

I felt that these counterclaims alleging Jordon's misdeeds had no merit and I felt it would be a mistake to make Jordon a party because that would lend credence to the defense and it seemed to me that if any information developed which indicated that Jordon had indulged in any misconduct, we could always pursue that separately.

Q Did Mr.Silverman have anything to say on the subject?

A My impression was that he felt he was obligated to bring this possibility to my attention, but that he agreed with my analysis, that it was not a good idea.

Q Did Charles Gross influence that decision in any way?

MR. GRUTMAN: Objected to. How could this witness tell us whether Gross influenced Silverman's decision?

MR. MANDEL: No, Mr. Miles' decision.

THE COURT: Go ahead, you may answer.

A No.

Q What was the next thing that happened about the Buckley arbitration?

A Things were winding down around then. Newburger, Loeb had delivered all our accounts out --

Q Will you explain that?

A We had ceased being an account carrying brokerage firm and we delivered our customer accounts to W.E. Hutton.

Q You became --

A An introducing house, and about that time Golenbock & Barell transferred all their files to the new counsel and I believe the last conversation I had about the Buckley case was in a conversation I had with Mr. Risher. Just before I left, he asked me to give him a summary of all the open collection items, urged me to try to make quick collections with a view to getting cash in without necessarily a regard as to the optimum result, and the Buckley case was on that list, I am sure, and I discussed it with Mr. Risher and about a week or so after that, I was laid off.

Q About when did you leave Newburger, Loeb?

A The end of November.

Q Did you know whether the Newburger, Loeb arbitration had been transferred from Golenbock & Barell to Finley, Kumble?

A It was my understanding all of Golenbock's files with respect to Newburger, Loeb had been transferred and I assumed that the arbitration was pending.

Q Did there ever come a time when Mr. Persky asked you for any information about the Buckley case?

A I don't recall any.

Q Did there ever come a time when Larry Berkowitz asked you for any information about the Buckley case?

A We may well have discussed it. Larry and I worked together for a few weeks.

Q Do you recall any such conversation?

A No.

Q YOu don't know --

A I have no recollection of it, but I wouldn't be surprised if we did.

Q Did there come a time ever when Risher asked you about your judgment of the Buckley case?

A Well, it would have been at that meeting and I am sure it was discussed, but precisely who said what to whom, I just don't recall.

Q Did there ever come a time when you changed your judgment with regard to the Buckley counterclaims?

A No.

Q Did there ever come a time when you said to anybody representing the partnership of Newburger, Loeb that you had changed your judgment and evaluation of that counterclaim?

A No.

Q When you said before that this kind of counterclaim had to be expected in this kind of case, what did you mean?

MR. SHAW: Objection, your Honor.

Q Will you expand on that?

MR. SHAW: Objection.

THE COURT: Under what circumstances did he answer before?

MR. SHAW: His opinion, and he went on to talk about his opinion and I objected to that.

THE COURT: I will sustain the objection.

Q In the course of your work have you acquired substantial experience with regard to legal tactics in the defense by customers of brokerage houses of actions for large debits?

MR. SHAW: Objection.

MR. GRUTMAN: I object.

THE COURT: Yes. I think this line should be terminated.

(In open court.)

BY MR. MANDEL:

Q In connection with your work at Newburger, Loeb was it part of your duty to consider such questions as insuring against churning of your firm's accounts?

MR. SHAW: Do you mean Merrill Lynch?

MR. MANDEL: Yes.

A Yes,it is.

Q Is it part of your duty to consider questions such as applicable capital turnover ratios?

A Yes.

Q Is it part of your duty to take into consideration such questions as the difference between speculative accounts and investment accounts?

A Yes.

Q Is it part of your duty to take into consideration questions of compliance with applicable regulations of the New York Stock Exchange and the American Stock Exchange?

A Yes.

Q Is it part of your duty to take into consideration questions regarding compliance with the securities laws of the United States?

A Yes, it is.

Q Is it part of your duties to take into consideration questions concerning compliance with rules and regulations of the Securities and Exchange Commission of the United States?

A Yes.

Q WEre those matters also part of your duties when you were with duPont from 1960 to 1969?

A Yes.

THE COURT: In addition to being part of your duties, did you do them, Mr. Miles?

THE WITNESS: Reasonably well, your Honor.

THE COURT: In other words, you did engage in such investigations and research?

THE WITNESS: Yes, I did, and supervised others who had that responsibility.

THE COURT: Very good. You may proceed.

Q I am giving you a hypothetical case, Mr. Miles. I ask you to consider the case of a person with an account who in 1962 was 31 years old, came from a family where his father was a director and an important official of a major wood and paper company in the United States, who lived in a house on 11 acres, with 22 rooms, who had been dealing with a customer's man at another house from 1959 to 1962, and from 1962 until 1966 had an account with this same customer's man at Newburger, Loeb & Company, and I ask you to assume further that this person in the hypothetical question had an important executive position with one of the major companies in the United States and at the start of the period was earning 10 or 15,000, and at the end of the period was earning about $30,000 a year, had received promotions during the interim period, he and his family were getting gifts from his father of $25,000 a year, that he had some accumulated stock with which he could begin and continue to fund an account, was able to put more money into the account from time to time; that his avowed purpose was to speculate and make gains and he was not interested in income and that he wanted to make a lot of money, and I also ask you to assume that Exhibit D accurately represents the history of his account and I also ask you to assume that DD also accurately represents the history of this account, and I also ask you to assume that this person had a master's degree in economics or business, had taken a course in security analysis, had at least one other substantial brokerage account during the period of '62 to '66, had had at least two or three accounts before beginning the account in 1962; that this person gave no discretion to the registered representaitve and that the registered representative took no discretion with regard to the account; that every single transaction in the account was approved or authorized in advance by the person.

I ask you to assume further that over the entire period the registered representative and the customer spoke to each other on the phone at varying amounts -- about perhaps five or six times a day; that the customer turned down eight or nine out of every ten recommendations the registered representative made; that perhaps 80 per cent of all the transactions in the account, for your assumption, resulted from the suggestions of the registered representative, and I ask you, in your opinion, whether any or what annual capital turnover rate was applicable as a safe maximum to avoid a churning question in this situation?

MR. SHAW: Could we have a moment, your Honor?

(Pause.)

MR. SHAW: No objection, your Honor.

A I would say under those circumstances I would have grave doubts as to whether there was any turnover rate that would be relevant because there would not be any element of control or domination, under those circumstances.

I would say that you are describing essentially a classic case where an active account would be totally without risk of a successful churning claim.

MR. SHAW: Objection, your Honor. I move to strike everything after "I would think you are describing a case." That was not responsive to the question, which was what was the maximum turnover rate, and the answer the witness gave is that there is no maximum and everything else is unresponsive.

THE COURT: I will think about that.

Go ahead.

What is the answer, the one clause that is questions?

(Record read.)

THE COURT: I will give consideration to whether that is stricken or not.

Go ahead.

MR. MANDEL: Do I understand the prior portion of the answer stands, your Honor?

THE COURT: Yes.

Q In the course of your experience, day-by-day over the years, are you familiar with many such accounts?

MR. SHAW: Objection.

THE COURT: No, overruled.

A Very active accounts? Yes.

Q Where there is no discretion given and the customer is a competent person, in your opinion is there any limit to the amount of permissible activity?

A I would say that you could create a turnover rate which would be so destructive and obviously against the customer's interests, that you could say even in those circumstances the broker has an obligation to step in and do something about the turnover rate.

However, under these circumstances, and disregarding the question of whether or not there was control or not, I would certainly be comfortable with 20 or 30 times a year turnover.

Q In an account like this?

A In an account based on your hypothetical.

Q Would you have any opinion with regard to the suggestion that the maximum turnover rate of two times a year is applicable to this situation?

A To your hypothetical?

Q Yes.

A I would say it is ridiculously low, again disregarding the question of control, even if there was a certain element of domination -- it is astonishingly low.

Q Even if there is an element of control, you say two times is ridiculously low?

MR. SHAW: Objection.

A Yes, I do.

THE COURT: No, overruled.

Q Even if there is an element of control with this kind of an account, where the customer knows and wants to speculate, what is your opinion of ten times as annual turnover rate?

A I would have no problem about it, especially if the activity was reasonably successful, if the customer was making money. If the customer was suffering disastrous losses, then you might have to look into it. I don't believe there is a formula answer here. You have to look at all the circumstances.

Q When you say you would look into it, do you mean you would look into it in order to be conservative and protective of the firm?

A That's right.

MR. MANDEL: Your witness.

CROSS-EXAMINATION

BY MR. SHAW:

Q Mr. Miles, did you examine the Buckley ledger account?

A Yes.

Q When?

A Spring and summer of 1970.

Q Have you looked at it since then?

We will take a recess for some ten minutes.

(Recess.)

CROSS-EXAMINATION

BY MR. GRUTMAN:

Q Mr. Miles, did you testify that this was a profitable account for the customer?

A I testified that Mr. Jordon had indicated that up until the Westec suspension that Mr. Buckley had been ahead.

Q Is it not a fact, sir, that the net result of his trading in the account resulted in Mr. Buckley's losing every nickel of his own money and running up a debit balance of nearly $300,000?

A Taking into account the Westec losses, that may well be the case.

Q That is the reality of what happened, isn't it?

A If those figures are correct, yes.

Q Yes, in round numbers, they are.

THE COURT: Do you have an objection?

MR. MANDEL: Yes. I think it is argumentative and really irrelevant. We know that when Westec collapsed--

MR. GRUTMAN: Your Honor, may I object to Mr. Mandel --

THE COURT: I think the problem he is raising is that there is no time frame for your questions, that your questions to this gentleman had two different time frames appearing to be as one.

Q Within the total time period, from the time he opened the account, in 1962, until the end of the account, in 1966, is it not the fact, Mr. Miles, that the reality of what happened was the total loss of every nickel he put into it of his own money, as well as running up a debit balance of several hundred thousand dollars?

MR. MANDEL: That is irrelevant, your Honor --

A What he put in less what he took out -- there may have been withdrawals.

THE COURT: I will overrule that objection.

Go ahead.

Q Did you yourself, or by an assistant, while you were at Newburger, Loeb, ever cause a transaction by transaction analysis to have been conducted of every trade, every purchase and every sale, in the account of Mary and David Buckley originated by Gross & Company and cleared through Newburger, Loeb?

A No, I did not.

Q So that in your official capacity as compliance director of Newburger, Loeb, that was not done by you or anybody else at your instance, direction or under control?

A That's correct.

Q I take it that some time subsequent to your separation from Newburger, Loeb someone on Mr. Mandel's behalf consulted you and asked you to be a witness in this case, is that correct?

A That's right.

Q Would you tell Judge Owen and the members of the jury when the first time was you were solicited to give testimony in this case on behalf of Mr. Gross and his company's litigants?

A I believe Mr. Mandel called me about a year ago and I indicated I was willing to testify.

THE COURT: In 1974, is that what you are saying?

THE WITNESS: I think so, yes -- some time back.

Q Did anybody else contact you besides Mr. Mandel?

A No.

Q When Mr. Mandel spoke with you did he make known to you the purpose for which he sought your testimony?

A Yes, in general terms.

Q Were you advised you would be asked to express opinions concerning whether or not there was or was not churning in the accounts of David and Mary Buckley?

A Yes, my opinion.

Q In the length of time that has elapsed since

Mr. Mandel contacted you in 1974 until today, when you have given the testimony which you did, did you or anybody at your instance and under your direction prepare a transaction-by-transaction analysis of every purchase and every sale in the David and Mary Buckley accounts which were originated by Gross & Company and which cleared through Newburger, Loeb during the period 1962 to 1966? Just yes or no.

A No.

Q I would ask you,sir, whether or not in the year that has elapsed has Mr.Mandel made known to you his intention to call you and you said you would testify as a witness, whether you prepared a mathematically computed analysis of the turnover ratio which in fact went on quarter-by-quarter in the David and Mary Buckley accounts.

A That was not my understanding of what I was to do.

THE COURT: The answer is he did not.

Next question.

Q Did you have access to information on which such a piece of information or such a fact could have been extrapolated and prepared?

A No, I didn't have possession of the statements.

Q Isn't it a fact that you could have by analyzing all of the trades in this document, Exhibit B in evidence -- that you could have extrapolated a turnover ratio for the whole period in question, between '62 and '66?

A I assume I could.

Q But that wasn't done by you?

A No, it wasn't.

Q Did you tell Mr. Mandel it was your understanding that there is no such thing as an acceptable turnover ratio?

A There is no such thing?

Q Yes, sir.

A I believe I testified that I didn't believe it was a formula decision as to whether or not there was churning. One element is the turnover ratio.

Q That is not my question. I asked you whether or not you testified there was no such thing as an acceptable turnover ratio.

A I don't know whether I said that.

Q What is your opinion, sir, today, as you testify in this court and before this jury, as to whether or not there is or is not a concept known as an acceptable turnover ratio?

A I don't believe there is any such concept and I wouldn't adhere to it. It depends on the surrounding circumstances.

Q You have been at Merrill Lynch for what length of time?

A Four and a half years.

Q So that means you were there in February of 1972?

A That's right.

Q Do you know a man by the name of Howard T. Sprow?

A Yes.

Q What is his position with Merrill Lynch?

A General counsel.

Q That means he is a practicing lawyer who has a position at the concern, above you, is that correct?

A At the time I was working for him.

Q Would you regard him as an authority?

A Yes.

Q Do you agree with Mr. Sprow, who has stated -- and I am reading from Exhibit M, "There is no 'acceptable turnover rate,'for obvious reasons, but the Courts have considered a rate of turnover of slightly over twice a year to be excessive". Do you agree with that statement by the general counsel of Merrill Lynch under whom you work?

A That quote is taken out of context.

rate is in context only if it is compared with relationship between commissions and profits and control.

MR. GRUTMAN: Yes, your Honor.

(In open court.)

MR. GRUTMAN: Yes, Judge.

Q I am going to read to you page 1 and down to the middle of page 2 of the general counsel's memorandum.

"Churning is easier to define than it is to identify. We can define it as excessive trading in an account which is induced by a broker for the purpose of generating commissions."

Do you agree with that much?

A Yes, I do.

Q "As you can see, much of that definition is subject to interpretation. What, for example, is excessive? How do you determine when trading is induced? How do you determine the motivation or intent of the broker? To attempt to measure these matters, the SEC devised certain guidelines which it used in many of the administrative proceedings it brought against brokers on churning charges. Although in the past relatively few cases of churning reached the court, there have been an interesting number within the past two years, and the court decisions plainly rely heavily upon these unofficial SEC guidelines. The result of this has been to hold brokers to higher standards of accountability than had been the case a few years ago."

Do you agree with all this so far?

A I agree with the whole memo.

Q "Let us examine these guidelines and see what they can tell us: (1), control by account executive. In order to sustain a charge of churning, the customer must be able to demonstrate that the account was controlled by his account executive. If the account executive exercises discretion either formally or with the tacit acquiescence of the customer, he has control over the account.

"An account executive also can exercise control without exercising discretion."

Do you agree with that, Mr. Miles?

A Yes.

Q "This occurs where the customer relies to such an extent upon his account executive's recommendations that he rubberstamps suggestions which are offered to him."

The SEC put it this way: "It has long been established that a broker-dealer or salesman who uses his relationship of trust and confidence to a customer to cause an excessive number of transactions in a customer's account commits fraud upon the customer whether or not the account is a discretionary one."

I take it you agree with that?

A Yes, I do.

Q Paragraph 2: "Relationship between commissions and profits. The second guideline is the establishment of a high ratio of commissions as compared to the customer's profits. In other words, who benefited from the activity, the broker or the customer."

You agree with that, don't you, as a criteria or guideline?

A Yes, in general I agree with the whole --

Q Lastly, Section 3: "Turnover rate. The third guideline is a mathematical formula called the rate of turnover. This is calculated by taking the total of dollar value of purchases during the period under review, whether it is three months or three years, and dividing it by the average equity in the account for the same period. The figure carried out to two decimal places the 'turnover rate'. There is no 'acceptable turnover rate' for obvious reasons, but the courts have considered a rate of turnover of slightly over twice to be excessive."

MR. MANDEL: Twice a year.

MR. GRUTMAN: Thank you, Mr. Mandel.

Q "Naturally, the turnover rate would be greater for an account with a small amount of money invested. It is important to note that in any case brought by the SEC all three of these elements were present, it was not simply a case of establishing any one of them."

Do you agree with all of that, of the memorandum which was written by your chief, the general counsel, Mr. Sprow, in 1972?

A Yes, I do.

Q Let's go, in the instance of the hypothetical case that was put to you, when you answered the questions Mr. Mandel propounded and having assimilated all of those hypotheses, I take it the answer you gave was predicated upon the assumption of the correctness or the truthfulness of each and every one of the elements that went into the hypothetical and upon which you gave your answer, is that correct?

A Yes, I would say so.

Q Would it also be correct, Mr. Miles, that if the hypotheses were different, as matters of fact and not simply hypotheses, your answer would be different, would it not?

A It might be.

Q For example, in the hypothesis propounded by my friend, Mr. Mandel, he told you the man involved in the case was a speculator who was willing to plunge wildly

Q I want you to assume that prior to the time involved the maximum debit balance he ever had in any brokerage account never exceeded $15,000 a year, and over the period a debit balance approaching $300,000 had been approached, and $75,000 -- assuming those to be the facts, would you not say that I have described a churning situation?

THE COURT: $75,000 fees.

A Not necessarily.

Q Assuming control?

THE COURT: That was included in your hypothetical.

A I come back to the question of the customer's intent and objectives.

Q Assuming the customer did not want to speculate but that the customer was under the control of the broker, was making only between 15 to $30,000 a year, was not really a sophisticated investor, and you had the financial debacle I described, would that not be a case of churning?

MR. MANDEL: I object to the question because Mr. Grutman has again said assuming the customer did not want to speculate, which is contrary to the evidence --

THE COURT: I agree with that. You are getting into shades of meaning and Mr. Silfen gave us what we are using for the basis of this question.

Q Assuming the objectives were as described by Mr.Silfen, he wanted to make gains, but not speculate per se -- including that proposition in the hypothesis, but adding the elements of control and all the other things, would that not be a description of a churning situation?

A I would say that would be pretty close to it.

Q Do you remember what the telephone number of Newburger, Loeb was when you worked there?

A No, I don't.

Q How long did you work there?

A About a year.

Q 944-8300, was that the number?

A I believe so.

Q You were not able to recall the telephone number, sir, but I recollect that you told Mr. Mandel that you seemed to remember a conversation that you had with Mr. Leo Stern concerning the decision that was made about liquidating or not liquidating the Westec stock, is that correct?

A Yes.

MR. MANDEL: I object to this as argumentative.

THE COURT: It is argumentative.

Q Did you make a memorandum or have you looked at

Westec at a time when the regulatory agencies forbade any such trading in that stock, correct?

MR. MANDEL: How is this relevant?

THE COURT: I sustain the objection.

Q Is it not the fact, Mr. Miles --

THE COURT: Is this the same subject matter?

MR. GRUTMAN: No, it is about the conversation with Leo Stern.

THE COURT: All right.

Q Isn't it the fact that the conversation which you had with Leo Stern was a conversation in which he told you that Newburger, Loeb would not sell Westec on the black market or while there was a prohibition against sales?

A I don't recall him saying that. I assume we wouldn't.

Q When you say you don't recall him saying that, are you saying you have _a_ recollection that he didn't or that he may have and you just may have forgotten?

A I would remember that.

Q Just as you say you remember the conversation concerning the decision about not selling Westec when it was legal to resume sales of Westec?

A Yes.

Q When you left Newburger, Loeb, were you discharged by Mr.Berkowitz?

A It might have been Mr. Risher.

Q When you left Newburger, Loeb, did you leave with good feelings or bad feelings?

A Good feelings.

Q For testifying in court, may I inquire whether there has been an agreement made between you and Mr. Mandel for the time you have spent both in preparing to come to testify and for the time you are spending here, to be compensated?

A No, no such agreement.

Q Do you expect to be compensated?

A No, and I wouldn't take it.

Q So you are doing this for some other reason other than money, is that correct?

A Yes.

Q I understood you to say that you were a graduate of Williams College and at first you had a B.S., and then B.A. Would you explain how you made that confusion, what were you thinking of when you said B.S.? You are a graduate of the Yale Law School?

A Yes.

Q But you are not admitted to practice in this STate?

A That's right.

Q Are you admitted to practice in any state?

A No.

Q Have you ever taken the bar examination?

A Immediately when I got out of law school.

Q Did you pass it?

A No.

MR. GRUTMAN: No further questions.

REDIRECT EXAMINATION

BY MR. MANDEL:

Q Mr.Miles, you answered a hypothetical in favor of my friend, Mr.Grutman, where he gave you a series of facts, including control of the account by the account executive where you said it might be pretty close to churning.

Now, I ask you to add to that hypothetical these facts, that the customer got confirmations promptly in the case of every sale over the entire period and he got monthly statements promptly over the entire period, he understood them entirely and he kept his own records and made his own tax returns and did periodic balance sheets for himself to establish his total position, and he consulted periodically with friends in the industry and for a period of trading of '62 until '66, while the trading was going on, he never once complainted to anybody about any of the transactions, and that in '66 he consulted an attorney who consulted an expert and he still did not complain about any of the transactions, and in '67 he did not complain about the transactions, in 1968 he went to his attorney and raised the question of churning with his attorney, and the attorney told him "You are a big boy, you are not an old lady," and the customer still did not complain to anybody, and in 1969 he did business with the customer's representative again, the customer seeking out the representative at a new location.

Would those added facts change the answer you gave to Mr.Grutman?

A They change the hypothetical.

Q Would they change the answer you would give?

A Yes, sir.

Q What would your answer be in that case?

A I would say there was evidence of sophistication, of intent to speculate and of lack of control.

Q And, therefore, what conclusion would you reach about churning?

A None.

Q That answer is ambiguous.

A There would be no churning.

rmrf 4

witness stand, and you are to give consideration to this testimony.

This is being offered as a statement of a partner or officer of Newburger --

MR. MANDEL: Partner.

THE COURT: Partner of Newburger, Loeb & Company, predecessor in interest to Newburger, Loeb, Inc.

MR. MANDEL: Yes, your Honor.

THE COURT: You are to give this the same consideration as if the witness were sitting on the stand at this very moment and being asked these very questions and giving these very answers.

In other words, it is preserved testimony that is carried forward today so that it may be read to you.

MR. SHAW: I think the record should be clear that Leo Stern passed away shortly after this deposition was taken and that is the reason he is not being placed on the witness stand at this point.

THE COURT: Well, this could be read whether or not he died, but I see no harm in the record being clear on that. This could be read even if Leo Stern were alive and sitting in the courtroom.

MR. MANDEL: I am starting on page 3, line 11 --

THE COURT: This is the deposition of Leo Stern on behalf of -- being taken as a partner of Newburger, Loeb & Company?

MR. MANDEL: And as an individual defendant.

THE COURT: This testimony was taken where and when?

MR. MANDEL: It was taken in New York City on January 7, 1972, part of it, and then January 13, 1972.

THE COURT: Mr. Stern was under oath at the time and was represented by counsel?

MR. MANDEL: Yes.

THE COURT: Would you read the list of counsel in attendance, please?

MR. MANDEL: The appearances, the first session, Messrs. Finley, Kumble, attorneys for plaintiff, and additional defendants on counterclaims, by Alan Gelb, Esq., Messrs. Golden, Wienshienk & Mandel, attorneys for defendant by Phillip Mandel, Esq., and although I don't have it here, I can represent to the Court that all counsel were notified and invited to attend.

THE COURT: Given an opportunity to attend?

MR. MANDEL: Right.

MR. ESTERMAN: All counsel in the case at that time, your Honor. There were others who came in later.

THE COURT: Right.

MR. MANDEL: Page 3, line 11:

"Q Mr. Stern, were you a partner of Newburger, Loeb & Company?

"A I was.

"Q During what period?

"A I don't know how far back, until 1970.

"Q Until 1970?

"A Yes.

"Q And starting back beyond the memory of man runneth not?

"A Well, many years.

"Q Were you a member of the executive committee at any time?

"A I was at one time.

"Q During what period?

"A Through early 1970."

That ended on page 4, line 8.

I now go to page 14 -- do you think it would be easier to follow if my friend Mr. Rothman read the questions and I read the answers?

THE COURT Either way. It would be. Do you have two copies?

MR. MANDEL: No, he would have to look over my shoulder.

THE COURT: If you could put one of you on the witness stand --

MR. MANDEL: If we could get another copy, I would be happy to do that.

MR. GRUTMAN: I have a copy and I would be happy to sit up there, your Honor.

THE COURT: Go ahead,Mr. Mandel.

MR. GRUTMAN: I didn't mean that facetiously, your Honor --

MR. MANDEL: But I mean it seriously. Thanks.

Page 14 --

THE COURT: I can make a pun. Mr. Grutman is not stern enough.

MR. MANDEL: Page 14, line 20:

"Q Do you know Mabel Bleich?

"A Yes.

"Q Was she a limited partner?

"A Yes.

"Q In 1970 and 1971?

"A She was in 1970. I don't know her status in '71.

"Q Let me put it this way, was she a limited partner up until the time in February of '71 when the deal was signed?

"A Yes.

"Q As of today, do you know whether she objected to that deal?

"A Yes.

"Q Did she object to the deal?

"A Yes.

"Q When did you find out that she objected to the deal?

"A I don't remember dates like that.

"Q In a general way, did you find that out before the deal was made or after the deal was made?

"A I don't recall her making a special objection, a written objection, or verbal objection.

"Q But you know she objected?

"A Ultimately. For a while she went along with it.

"Q But in the end, she objected to it?

"A Yes.

"Q That is to the deal?

"A Yes.

"Q And her lawyers protested on her behalf?

"A I don't know.

"Q You don't know whether they did or not, you just know that she objected to it.

"A Yes.

"Q My question to you is, did you find out that she objected to it before you put your signature on that paper?

"A Yes.

"Q But you signed anyway?

"A That is obvious, isn't it?

"Q Did you discuss her objections with any of your partners, including your son, Richard?

"A No."

I am skipping the colloquy.

"Q Who informed you of her objections?

"A Of whose objections?

"Q Mabel Bleich's.

"A I don't recall.

"Q Who is Jeanne Donoghue, do you know?

"A Yes. She is Charles Gross' sister, who lives in Australia.

"Q What was her relationship to the partnership?

"A She was a limited partner.

"Q When you signed the agreement in February 1971 were you aware that Mrs. Donoghue objected to it?

"A Yes.

"Q Were you aware that Charles Gross objected to it?

"A Yes."

I now go to page 18, line 14:

"Q Are you aware that of this day the capital of

Mrs. Bleich and Mrs. Donoghue has not been returned to them?

"A Yes.

"Q Are you in favor of returning that capital to them or of not returning that capital to them?"

And I am skipping colloquy.

"A I am in favor of not returning that capital."

MR. GRUTMAN: "The capital."

MR. MANDEL: That is correct, "The capital."

"Q Do you know of any claim that the partnership had against Jeanne Donoghue?

"A No.

"Q Do you know of any claim that the partnership had against Mabel Bleich?

"A No.

"Q As far as you know, Mr. Stern, did Jeanne Donoghue ever commit a wrong against the partnership?

"A No.

"Q As far as you know, did Mabel Bleich ever commit a wrong against the partnership?

"A No.

"Q What is the basis on which you favor not returning the capitals of Mabel Bleich and Jeanne Donoghue?"

I am skipping colloquy.

"A That they asked for special treatment which none of the other limited partners got.

"Q Did you ever ask anybody whether Mrs. Donoghue and Mrs. Bleich had a right to have their capital returned to them?

"A No.

"Q That is true as of this date, is that correct?

"A Yes."

May I place on record that this date was January 7, 1972.

I now go to page 38, line 22:

"Q In making the agreement of February 1971 did you have an understanding as to whether or not Gross' capital would be returned to him?

"A No.

"Q Didn't you know whether you made that agreement, Mr. Stern, that the corporation was going to take the position that Gross' capital should not be returned to him because he demanded unequal treatment?

"A Yes.

"Q And you were in favor of that too, were you not?

"A Right.

"Q Because you felt he had no right to demand unequal treatment, is that right?

"A Right.

"Q And as of today, you think his capital should not be returned because he demanded unequal treatment?

"A Yes.

"Q And you discussed this with your partners, did you not?

"A Probably.

"Q You know you did, did you not?

"A I don't know.

"Q Were you the originator of the idea that Gross should not get his capital back because he demanded unequal treatment?

"A No.

"Q Somebody else originated that idea?

"A Right.

"Q One of your partners, is that correct?

"A (No response.)

"Q That is correct, isn't it?

"A I don't know if it was one of my partners or the corporation.

"Q But, at any rate, somebody else communicated that idea to you, is that correct?

"A Yes.

"Q And you went along with it, did you not?

"A Yes.

"Q Enthusiastically, did you not?

"A You go along with something or you don't. There is no enthusiasm involved.

"Q At least you wouldn't say you went along with it reluctantly.

"A No.

"Q And it was on the basis of your agreement with that idea that you signed the agreement of February 1971, is that correct?

"A Right."

I now go to page 48, line 7:

"Q All right, let me lay a foundation so that we will understand each other and so that there will be no confusion. While you were a partner of Newburger, Loeb & Company you heard that Buckley had started a proceeding against that partnership, is that right?

"A Yes.

"Q And that the basis of the proceeding was not anything Newburger, Loeb had done but something Gross & Company had done?

"A Yes.

"Q And as a businessman and as a responsible partner confronted with that claim of Buckley's loss, did you make rmrf 14 "Stern

it your business to get some kind of an evaluation of whether he had a good claim or a bad claim or a worthless claim or any different kind of claim?

"A No.

"Q Was the question of settling the Buckley claim ever discussed?

"A Yes.

"Q By whom?

"A By my partners.

"Q Did they discuss it with you?

"A I think so.

"Q Did they ask for your opinion?

"A No, that was a legal matter.

"Q What was the nature of the discussion between you and your partners about the Buckley claim?

"A I have no recollection of the exact discussion.

"Q I don't mean the exact discussion. What was the general nature of it?

"A This was something in the hazy past.

"Q Can you remember anything at all other than the fact that there was some kind of discussion about it?

"A Yes.

"I can't remember any details at all.

"Q Right, but in a general way, without details, what is it that you can remember, if anything?

"A I can't help you on that.

"Q You can't remember anything at all other than there was some kind of a discussion?

"A Yes.

"Q Did you have any opinion yourself about what should be done about this matter?

"A Yes.

"Q What was that opinion?

"A That we take legal action against Buckley.

"Q Am I right in saying that it was your feeling that you had good grounds to recover the money that Buckley owed the partnership?

"A Yes.

"Q Did there ever come a time when your opinion changed?

"A No."

I am now moving, your Honor, to the next section of the deposition, January 13, 1972, the same appearances noted.

Page 78, line 17:

"Q Do you recall that Buckley asked you not to sell out the Westec but to wait because he thought it would go higher?

"A I don't recall any opinion of Buckley.

"Q So it was your opinion that you should hold the Westec until it went higher?

"A He threatened to go bankrupt.

"Q You remember that?

"A I remember that.

"Q He said he couldn't pay, he was unable to pay?

"A Right.

"Q And he said if you pressed him he would go bankrupt

"A Right.

"Q Did he say anything else?

"A That is all I remember.

"Q Did he at that time assert a claim that his account had been churned?

"A Not to me.

"Q All that he said to you was that he couldn't pay up and if you pressed him, he would go bankrupt, is that right?

"A Right.

"Q Did he question, did he say to you that if you would make a settlement with him he might be able to get some money from his father?

"A I don't recall that specifically. We knew he had a very wealthy father.

"Q But in his discussion with you you didn't raise the question of getting any money from his father to make some kind of settlement?

"A No.

"Q And you believed that Buckley was out of money, did you not?

"A What was that question?

"Q What?

"A What was your question?

"Q And you believed Buckley when he said he had no money and he would go bankrupt if you pressed?

"A Yes.

"Q And that is why you did not institute a suit or arbitration against him, is that correct?

"A Right.

"Q And that is why you didn't sell out the Westec but held it in the hope that it would go up higher, is that correct?

"A Yes.

"Q And that was done by you on your own responsibility, is that correct?

"A No. I don't remember what partner I discussed it with.

"Q You did discuss it with one of the general partners?

"A Yes.

"Q Who agreed with you?

"A Yes.

"Q And that partner was not Charles Gross, is that correct?

"A Right."

I now go to page 90, line 4:

"Q Now, were there certain securities held in the partnership name so-called in-kind securities that were really held by the partnership for the partners?

"A Yes.

"Q Yes, and can you tell me what some of those securities were?

"A No.

"Q Were there some warrants that were held by the partnership for the partners?

"A Yes.

"Q Can you name some of those warrants?

"A The only one I can recall, Geon.

"Q The Geon warrants.

"Now, did you own some of the Geon warrants that were held in the partnership name?

"A I presume so.

"Q Yes, do you remember what happened to your Geon

"Stern warrants in the end?

"A They were -- they went to the corporation, together with all the other assets.

"Q You signed them over to the corporation in the deal that was made in January or February of 1971?

"A Right.

"Q Did you know you were signing over those warrants as part of the deal?

"A Well, in that deal, as I understand it included whatever assets there were in Newburger, Loeb, & Company partnership. They were virtually worthless at that time.

"Q So you were willing to sign them over along with the assets belonging to the partnership, is that correct?

"A Yes.

"Q And you also voluntarily transferred at that time all of the other in-kind securities that you owned but that were being held in partnership name, is that right?

"A Yes.

"Q Yes, did you presume to assign away Charlie Gross' in-kind rights too?"

And I am skipping colloquy between counsel.

"A Repeat that question?

"Q Did you presume to sign away Charlie Gross' rights to his in-kind securities which were held for him

"Stern in the partnership name?

"A To the best of my recollection, all of the assets of Newburger, Loeb & Company were sold to the corporation and if Charlie Gross' capital was part of it, I suppose, yes."

That is all I have on these depositions, your Honor.

MR. GRUTMAN: Your Honor, I believe if Mr. Mandel reads from the deposition --

THE COURT: I was going to say, in order that you can be orderly about this, I will give you until Monday morning to see what portions you wish to read. I will reserve your right.

MR. GRUTMAN: I know exactly what portions I wish to read, your Honor.

THE COURT: Then you may proceed right now.

MR. GRUTMAN: Beginning page 14, line 9, questions by Mr. Mandel:

"Q Let us see if we can put it this way:

"Is it your testimony, Mr. Stern, that before you signed the agreement in February of 1970 you had no knowledge that Gross objected to that deal?

"A Yes.

"Q Would you have signed that contract if you had

Honor, and we will save a little time.

MR. GRUTMAN: Thank you.

"Q Did you have a capital deficit?

"A No.

"Q How much was owed to you by the partnership?

"A Capital of something like $700,000.

"Q And in the deal that was made what did you get for that capital?

"A Preferred stock in the corporation.

"Q And you were willing to take that?

"A Yes."

Page 92, line 24:

"Q How about your son Robert Stern, did he have any ownership of those securities? Did he own some of the Geon warrants?

"A Yes.

"Q Did he sign away his interest in the Geon warrants when the deal was made with the corporation?

"A He signed away whatever --

"Q Is that a legal question you cannot answer?

"MR. GELB: Let him finish.

"A He signed away whatever claims he had or property he might have had as part of the partnership."

THE COURT: We will take our recess at this point.

(Jury leaves courtroom.)

MR. GLATZER: On behalf of the additional counterclaims of Kayne, Muh & Sloane, we reserve the right to open until the beginning of Mr. Mandel's counterclaim. I see from the discussion before that we are kind of in a --

THE COURT: I thought you reserved the right to open to the beginning of the presentation of your own material.

MR. GRUTMAN: I gather Mr. Mandel will be presenting now in somewhat amalgamated fashion both his defenses to the churning claim as well as the counterclaim.

THE COURT: He is putting in his case as defined by the pleadings.

MR. MANDEL: I am not defending against the counter counterclaims at the moment.

MR. GLATZER: When Mr. Mandel rests --

THE COURT: Then you will have an opportunity to open.

(Recess.)

(Jury present.)

MR. MANDEL: Your Honor, I have one small item of unfinished business. You may recall Mr. Shaw and Mr. Risher were going to find out for us how much the Finley, Kumble firm got paid --

THE COURT: What the billing was?

MR. MANDEL: Yes, for putting through the transfer agreement.

MR. GRUTMAN: That is not what we were asked to do, we were asked to find out what the outstanding open bill was.

THE COURT: I asked you whether or not you kept a file of bills and the question was would the Newburger, Loeb files contain that bill or any information on it.

MR. SHAW: We have not succeeded in locating the documents, your Honor, but we are continuing in our efforts to find them.

THE COURT: Very well. Call Mr. Silverman.

ARTHUR C. SILVERMAN, called as a witness by the defendants, being first duly sworn, testified as follows:

THE COURT: Mr. Shaw, could you report back on that subject by noon Monday?

MR. SHAW: Yes, your Honor.

DIRECT EXAMINATION

BY MR. MANDEL:

Q Mr. Silverman, are you a member of the Bar of the State of New York?

A I am.

Q When were you admitted?

A I was admitted in 1965.

Q Will you please state your personal background?

A Yes. I graduated Columbia Law School in 1964 with an LLB in law. I became a member of the Bar of the State of New York in 1965. From 1964 to 1965 I was a law clerk in the Federal United States District Court of Appeal for the Second Circuit. In 1965 I became employed as an associate by a 12-man law firm.

In 1968 --

MR. GRUTMAN: Could we have the name of that firm?

A Baer & Marks.

At the time I joined Baer & Marks there were two other names in the firm, Friedman and Berliner.

In May of 1968 I left Baer & Marks and became an associate of the firm of Golembock & Barell.

In January of 1972 I became a member of Golenbock & Barell and have been a partner of that firm ever since.

From prior to law school, I received an electrical engineering degree from the Massachusetts Institute of Technology.

In terms of being a member of the Bar, I am a

member of the Bar of the State of New York, of the Federal District Court, this court, the Southern District of New York, and in the Eastern District of New York, of the Court of Appeals for the Second Circuit, the Tax Court of the United States and the Supreme Court of the United States.

Q When did you first meet Charles Gross?

A I first met Charles Gross in or about May of 1970.

Q When did you first have anything to do with the affairs of Newburger, Loeb & Company?

A Sometime in or about September of 1969, in or about that time, August of September of 1969, Golenbock & Barell, the firm for which at that time I was an associate became general counsel to Newburger, Loeb & Company, a New York partnership.

Q At that time did you have any knowledge of how Golenbock & Barell came to be retained by Newburger, Loeb & Company?

A No, I did not.

Q Was the name Charles Gross familiar to you at that time?

A It was not.

Q When was the first time you had any contact with or heard anything about a Buckley matter with Newburger, Loeb & Company?

A On or about October 1, 1969, when I received a memorandum from the head of the Litigation Department in which I was an associate of, the head of that department is an attorney by the name of Leonard Wagman and he was at that time and is today a member of Golenbock & Barell.

Q Is that memorandum a business record kept in the ordinary course of the business of Golenbock & Barell?

A Yes, it is.

Q And is it customary to keep such records?

A Yes, it is.

Q Do you have a copy of that document with you?

A I have the original of that document here. It is a page and a half memorandum of October 1, 1969 from LWW, which are the initials for Leonard W. Wagman, to ACS, which are my initials.

MR. MANDEL: I offer it as Defendants' Exhibit EE.

(Pause.)

MR. SHAW: No objection.

(Defendants' Exhibit EE for identification received in evidence.)

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Q Would you please read the exhibit to the jury, Mr. Silverman?

A The memorandum from Mr. Wagman is entitled, "Newburger, Loeb with David Buckley."

"As related to me by Mr. Leo Stern at Newburger, Loeb, the following are the facts" --

THE COURT: This is dated?

THE WITNESS: October 1, 1969.

Your Honor, I said I received it on or about that date. My time sheets reflect I received it October 3rd.

A "As related to me by Mr. Leo Stern at Newburger, Loeb, the following are the facts. David Buckley was a customer of a brokerage house for whom our client cleared. Buckley is a fairly high-salaried executive at Lever Bros. and Buckley's father was a former director and officer of Georgia-Pacific. Buckley's account was very active and apparently dealt in many speculative securities. In the summer of 1966 there were two accounts, one for Buckley and one for his wife, showing total debit balances of $280,000 to $290,000. At the present time those accounts have the following debit balances as a result of accrued interests: Mr. Buckley, $173,083, and his wife, $179,906.

"Mr. Buckley's attorney is a Mr. Ryan at Webster, Sheffield, 582-3370, to whom I spoke on Friday. Mr. Ryan is to leave on vacation this week and in his absence the matter is to be handled by Mr. Holtzschue. Ryan told me that Buckley owes money to other brokerage houses and other creditors and is in fact insolvent.

"However, he doesn't want to file a bankruptcy petition and thus Buckley's father is attempting to make good on some of these debts. The accounts of the Buckleys at Newburger, Loeb now contain 13,800 shares of Westec. In addition to the proceeds from the sale of those shares, Mr. Ryan said that Buckley, Sr. was willing to pay $25,000.

"Our client (Mr. Stern) takes the position that at the time the present price of the Westec stock is worth approximately $69,000, which leaves a total debt of $283,989 against which the $25,000 payment would be made.

"Mr. Stern felt that this was not sufficient payment and of course I agreed with him, but told him that if we could satisfy ourselves that Buckley was indeed insolvent, we would have to be prepared to take considerably less than $283,989.

"Please contact the attorneys for Buckley and attempt to obtain a financial statement. Mr. Ryan indicated he would provide this and I think we should press for it in view of the fact that the sole reason for us settling is the inability of Buckley to meet his obligations and the threat of his filing a voluntary petition in bankruptcy.

"Before you make the call, please talk to me and I will give you some insight into the thinking of Buckley's attorney. Thank you."

Signed with the initials "LWW."

Q After reading Defendants' Exhibit EE, did you in fact talk to Mr. Wagman?

A I did. The memorandum had certain words in it which did not make sense. In addition to being invited by Mr. Wagman to speak to him, I went back to Leonard and said, "Leonard, could you please tell me what some of the memorandum means, "and he made certain changes, in his handwriting, to clear it up.

Apparently something was wrong with the dictation, the secretary didn't take it correctly --

MR. SHAW: Objection.

MR. GRUTMAN: Objection.

THE COURT: All right, put your next question.

THE WITNESS: May I finish the discussion with Mr. Wagman?

THE COURT: That is going to be, I assume, the next question. This was not responsive. That was the basis for the objection?

MR. SHAW: Yes, your Honor.

Q What were the contents of your discussion with Mr. Wagman?

MR. SHAW: Objection to anything Mr. Wagman may have said, your Honor. It is hearsay.

THE COURT: He is at that time attorney for Newburger, Loeb & Company?

MR. SHAW: That is correct, your Honor.

THE COURT: The hearsay objection I would overrule.

MR. SHAW: Your Honor, there has been no showing Mr. Wagman is not here and available. If he was the attorney, it would seem he should make himself available to indicate what he said, what he knew. I understand he is an attorney in New York City --

THE COURT: I take it he is available to any party that might wish to subpoena him.

MR. GRUTMAN: Your Honor, I press the objection on the grounds that while he was ostensibly the lawyer for Newburger, Loeb at the time Mr. Silverman is speaking about I believe he is really counsel for Mr. Gross and should be brought here in person.

THE COURT: I overrule the various objections.

MR. MANDEL: Your Honor, will you please instruct the jury that Mr. Grutman's statement is without foundation, is prejudicial and should be disregarded by them.

THE COURT: I will so instruct them, that it is to be disregarded, in any event. All right, go forward.

Q Will you continue with the discussion --

THE COURT: You may answer as to what you and Mr. Wagman said to each other.

A After the difficulties with the memorandum itself are cleared up, I asked Leonard what had been the substance of his discussion with Mr. Ryan. He said to me that it was the position of Buckley's attorney, Mr. Ryan, that if Buckley were to go through bankruptcy at that point, Newburger, Loeb would not receive as a general creditor of Buckley, of the Buckleys, $25,000, that Ryan believed that Newburger, Loeb should consider the $25,000 as a gift from Buckley, Sr., in order to stave off the son's having to go through and the daughter-in-law's having to go through the embarrassment and trauma of filing a bankruptcy petition.

Q Did Mr. Wagman give you any document at this time? Do you have any notes?

of the transaction and it contains some information of transactions between Mr. Wagman, as attorney for Newburger, Loeb & Company and the client, Leo Stern, who is a defendant here, and Webster, Sheffield, all bearing on the churning claim.

THE COURT: I don't see any basis to admit this, on present record.

MR. MANDEL: Well, I will establish that it is a record kept --

THE COURT: It is not a record kept in the regular course of business, no. It is somebody's memorandum and to the extent it is a memorandum that would either refresh Mr. Wagman's recollection or be past recollection recorded as to him, I would admit it, but, unfortunately, through Mr. Silverman, I don't see that it is necessary.

MR. MANDEL: Your Honor feels that though it is in the file it can't be qualified as a record kept in the regular course of business?

THE COURT: That is correct, under the Federal Shop Book Rule. That is my conclusion.

Q After your discussion with Mr. Wagman, what is the next thing that you did in connection with the Buckley matter?

A I called the attorneys for Mr. Buckley and

I believe I spoke to Mr. Holtzschue --

Q Can you fix the date?

A The first record in my time sheets is October 20th of 1969. However, I am not certain that that is the first phone call, because if a matter were substantially less than 15 minutes in length, we would not as a matter of the practice of the firm make a time sheet recording of that fact.

So that I would have to say that certainly on October 20th there was a conversation, it is possible there was one before.

MR. SHAW: Your Honor, I object and move to strike the repeated reference to documents which are not in evidence.

THE COURT: How does this affect you here?

MR. SHAW: The first time I didn't get up and object but this is the second reference to a document not in evidence.

THE COURT: He is not proving the document, he is giving a certain basis for an answer. The objection is overruled.

MR. MANDEL: What was the substance of your first conversation with Mr. Buckley's attorney at Webster, Sheffield?

A As best I recollect, its substance pertained to a brief review of discussions which Mr. Ryan had been having with Leo Stern and my request that we be provided with a financial statement of Mary and David Buckley certified to by a public accountant, so that we could ascertain whether the Buckley's were in fact insolvent and whether if they were to go through bankruptcy Newburger, Loeb would be receiving more or less or about $25,000.

Q Did this occur in one conversation or a series of conversations?

MR. SHAW: Objection, your Honor. This I understand is testimony with respect to a conversation between this witness and Mr. Holtzschue and I think we should go on to the next conversation now.

THE COURT: Was this in the course of this first conversation, as you recall?

THE WITNESS: Was --

THE COURT: This conversation about asking for a certified statement as to the Buckleys.

THE WITNESS: Yes, either a certified statement or a statement at least under oath by the Buckleys, something we could rely on.

Q Did you have a later conversation with Mr. Holtzschue about that subject?

A I don't recall today whether these later conversations were with Mr. Holtzschue or Mr. Ryan, but I had conversations with one or both of them later on.

Finally, about a month later, we did receive what purported to be a balance sheet purportedly representing the assets and liabilities and the annual income and expenses of the Buckleys. It was not accompanied by any certification, it was not accompanied by any affidavit under oath by the Buckleys as to the truth and accuracy of the statement.

Q I show you a copy of Exhibit P-32 in evidence and ask you if that is a copy of what you received from Web[illegible], Sheffield in November?

A Yes, it is.

Q What happened after you received P-32?

A I called either Mr. Holtzschue or Mr. Ryan at Webster, Sheffield, and the substance of our conversation was that there had not been accompanying this balance sheet either an affidavit or a certification and that as a result we could give no credence to this balance sheet, and the person to whom I spoke, I think it was Mr. Holtzschue, replied that he would get us an affidavit.

Q Did you subsequently receive another set of papers in the mail from Webster, Sheffield?

A Yes. About a week later we received a copy of the very same balance sheet, still no certification, still no affidavit, but there was a letter signed by the Buckleys, Mary and David, that to their best knowledge this was a true and accurate balance sheet, but there was nothing by a public accountant and there was no liability attaching to their being wrong, there was no affidavit under oath as to which the liability of perjury would attach if they hadnot told the truth.

Q I show you a copy of Exhibit P-33 in evidence and ask you if that is a copy of the documents you have just been testifying about?

A Yes, it is.

Q Would you please read to the jury the statement, which is part of P-33, signed by David W. Buckley and Mary Buckley?

A Yes. This is a letter dated November 20, 1969, which was the same date of the prior letter that I had received without this statement, and it is dated six days prior to the covering letter that accompanied this statement. There is an inside address of 82 West River Road, Rumsen, New Jersey. It is addressed to Arthur Silverman, Esq., Golenbock & Barell, 60 East 42nd Street, New York, New York, "Dear Mr. Silverman: We hereby represent that the attached balance sheet dated November 1, 1969 is a true and complete statement of our financial position as of that date and we further represent that there have been no material changes in our position to the date of this letter. This information is furnished to you solely for your use in connection with a settlement of claims against us by your client, Newburger, Loeb & Company. Very truly yours," signed, "David W. Buckley and Mary S. Buckley," and there is an indication in the lower left-hand corner of enclosure,"Enc."

Q Did you examine the balance sheet that was enclosed with that exhibit?

A Yes, I did.

Q Did you as attorney for Newburger, Loeb & Company form any judgments with regard to it?

A Yes, I did.

Q What were they?

A One judgment I had was that there were a lot of questions on the face of the balance sheet. For example, there were bank loans shown of $507,000, of which $307,000 was to a bank referred to as SCNB.

There were expenses which apparently exceeded income, expenses, for example, of interest alone of $50,900 against total income of $51,000. As part of income, there was shown trust income of $7,000, which meant that one or both of these Buckleys -- it meant to me -- were beneficiaries of a trust but there was not shown any assets of any trusts.

The total expenses of the Buckleys were purported to be $94,400 a year exclusive of interest against income of $51,000. There was a question as to where was the additional money coming from.

There was the question as to why there were taxes listed in the expenses of $6,500 if interest expenses were equal to total income. Interest is an absolute deduction from income for tax purposes and there should have been no taxes payable. Where was the taxable income that led to $6,500 of taxes?

There were a series of questions and then there was the judgment that was formed that there was no affidavit which accompanied this balance sheet and no certification which accompanied this balance sheet, only a signed letter.

Q Had you asked for an affidavit or a certification?

MR. GRUTMAN: We have had that, your Honor, several times.

THE COURT: He said he did. Mr. Silverman, these questions that arose that you testified to, these were ones that arose in your mind at the time you received and studied that letter, not today? This was at that time, is that right?

THE WITNESS: I believe at that time, your Honor -- I am virtually certain that these questions arose at that time and yet it is difficult to separate the operation of one's mind as to precisely when a thought comes into one's mind.

Q The date we are talking about placed in context --

THE COURT: You are virtually certain you had these questions at the time?

THE WITNESS: Yes.

Q What date are we now talking about, a date in November of 1969?

A We are talking about November 26th of 1969, or thereabouts. It could have been that day or a day or so later.

Q Up to that moment had you heard from Webster, Sheffield that the Buckleys had any claim that their account had been mishandled between 1962 and 1966?

MR. SHAW: Objection, your Honor, leading.

THE COURT: No, I will overrule that at this point. Go ahead.

A Not a word, no mention whatever of any claims at all. The only subject raised was what could they afford to pay, what would Newburger, Loeb get out of a bankruptcy, "You will be smarter taking a gift from Buckley, Sr., than going forward and getting nothing at the end."

Q After receiving the Buckleys' statement with the Buckleys' letter, what did you do next?

A I had a discussion with Mr. Wagman at which I showed him the balance sheet, told him of my concerns, and within the next day or so prepared a letter to Mr. Leo Stern, forwarding to him the balance sheet. I believe that letter was prepared on or about December 1st of 1969.

Q I show you Exhibit P-34 in evidence and I ask you whether that is a copy of the letter to Mr. Leo Stern you have just testified about?

A Yes, it is.

MR. GRUTMAN: Letter dated December 1st?

MR.MANDEL: Dated December 1, 1969.

Q Is that correct?

A Yes.

Q And you wrote that to Leo Stern as attorney for Newburger, Loeb writing to a responsible partner of Newburger, Loeb, is that correct?

A That is correct.

Q Will you read the letter to the jury, please?

A "Dear Mr. Stern" -- well, I have eliminated the inside address and the re is Mr. and Mrs. David W. Buckley.

"We enclose herewith a financial statement of the Buckleys together with a statement signed by both of them to the effect that the balance sheet is 'true and complete.' You will note that liabilities are $650,000 in excess of assets and that annual expenses exceed income by over $3,000. The key issue, as we see it, is whether to commence an action against the Buckleys for the substantial debit balance, risking the possibility that the Buckleys may declare bankruptcy and that Newburger, Loeb would then share as a general creditor in whatever funds may be left after claims of secured creditors are satisfied.

"Assuming bankruptcy were declared, Newburger, Loeb would, in addition to the proceeds obtained from the sale of the Westec stock, recover somewhere between $20,000 and $30,000, depending upon trustees, administration and legal expenses, extent of claims of merchandise and credit card creditors, and whether or not the 700 shares of Georgia-Pacific are pledged to the banks as collateral. This recovery is approximately equal to the $25,000 which Buckley's father has offered to voluntarily pay now. The course of action to be pursued involves essentially a business decision which must be based upon your evaluation as to whether the enclosed financial statement is accurate, whether Buckley's father would come up with a substantially greater sum were an action commenced and whether the risk of bankruptcy is real or feigned.

"In addition, the RR" -- that is registered representative --" who handled the accounts should be interviewed thoroughly to determine whether there is any reason to believe that the Buckleys may assert counterclaims. We await your further advice in the matter. Very truly yours, Arthur C. Silverman."

At the lower left are my initials and the initials of my secretary and the word "enclosure."

Q Can you tell his Honor and the jury what impelled you to state, "In addition the RR handling the account should be interviewed thoroughly to determine whether there is any reason to believe that the Buckleys may assert a counterclaim"?

MR. SHAW: Objection, your Honor. The witness is being asked to testify regarding a state of mind.

THE COURT: His own state of mind?

MR. SHAW: Right, five years ago.

THE COURT: Well, the time doesn't bother me. Overruled.

A Newburger, Loeb was a new client of the firm. I personally had had very little dealings with anyone at Newburger, Loeb at that time. Here we were about to consider commencing a large plaintiff's case, an action for money, to recover a debit balance, and as a matter of precaution in any plaintiff's case involving a client with whom I am not familiar, I always seek to interview the people who know about the matter best to determine whether there is any reason to believe that claims will be asserted back against the plaintiff.

It is a matter of precaution in order not to go stumbling blindly into something that we may later learn, and that is why I said we should interview the RR to see whether there are any potential counterclaims.

Also, it was my experience at Baer & Marks, the prior law firm I was at, where Baer & Marks had represented many brokerage firms, Herzfeld & Stern, H. Hentz & Company, Roosevelt & Company, and it had been my experience working on litigation and collection matters involving brokerage firms at that law firm that frequently customers would assert counterclaims in order to avoid payment.

Q After you sent the letter of December 1, 1969 to Mr. Leo Stern, what happened with regard to the Buckley matter?

A I heard nothing. I heard nothing in December, in January and February -- when I say I heard nothing, I heard no decision back as to what to do.

During that period of time I called one or more of the following people, Leo Stern, his son Robert Stern, who was the operations partner at Newburger, Loeb, and a general partner, and Dick Miles, who sometime in this period had been engaged and hired by Newburger, Loeb to be the head of its Compliance Department, a newly-formed department, and the answer that I received back was, "We have not decided yet."

So that it was not until the latter part of March that our firm received any indication or response other than, "We have not decided yet."

There were discussions with Richard Miles, I recall, concerning the accuracy of the balance sheet, and Dick told me that Newburger, Loeb would try to use its connections in the financial community to see whether that balance sheet was accurate or not.

Q What happened next?

A At the end of March, 1970 I received a memorandum from Leonard Wagman pertaining to this matter.

Q Do you have a copy of that memorandum here today?

A I have the original of this memorandum. Memoranda that were intra-office in nature, between partners or associates of Golenbock & Barell, were not turned over to successor counsel. What was turned over to successor counsel was correspondence, litigation papers, clients' papers and memoranda involving the interviewing of witnesses, if any.

Q Was this memorandum of March 27, 1970 a record kept in the regular course of business?

A Yes.

Q Was it customary for you to keep such records?

A It was.

Q I ask you to produce it.

THE COURT: Why don't you show it to the other side?

MR. MANDEL: Yes, your Honor.

THE COURT: You offer it in evidence?

MR. MANDEL: Yes.

(Pause.)

MR. SHAW: Your Honor, I repeat the objection previously made by Mr. Grutman with respect to this document on the grounds that, among other things, it is not a record made and kept in the regular course of business. Not having been turned over to successor counsel, it is a record prepared solely for the benefit of Golenbock & Barell.

THE COURT: The fact that it may or may not have been turned over doesn't seem to me to affect its business quality. How would that affect its business quality?

MR. SHAW: The business of the law firm, your Honor, as far as I am concerned, doesn't involve making memoranda for their own internal use, the business is to prepare pleadings, documents that go out.

THE COURT: The business of the office is to run a law firm and serve clients. I take it this memorandum, GG, is in the course of that. There is no question about that?

MR. SHAW: No question about that, your Honor.

THE COURT: Mr. Silverman, this memo, GG, is it the practice of partners and associates in the firm, who are working jointly on cases, to keep each other advised as to matters touching upon and affecting those cases in order that the cases may be processed through the office for the best effect for the client?

THE WITNESS: It is the practice of the firm to keep memoranda and prepare memoranda as well as to have personal conversations.

THE COURT: In any event, during the regular course of your business, so that you are advised of what someone else is doing that is working on a case, regardless of what the case is, memoranda are prepared to record events touching upon such cases?

THE WITNESS: That is correct.

THE COURT: This memorandum bears the date of March 27, 1970.

Did you receive it from Mr. Wagman on or shortly after that date?

THE WITNESS: I did.

THE COURT: I will admit it in evidence.

(Defendants' Exhibit GG received in evidence.)

Q Will you please read this memorandum to the jury?

A Interoffice memorandum of Golenbock & Barell, dated March 27, 1970 to ACS from LWW re Newburger, Loeb versus Buckley.

"Charlie Gross was in the office yesterday morning and said he would like some pressure applied to Buckley. Only this way can we get a better settlement proposal. Apparently the loans that are shown on Buckley's statement are guaranteed by his father who has put up collateral for the loans. Do you think we should commence proceeding and examine Buckley as quickly as possible in order to move this matter along? Let me have your thoughts, please. Thank you." Signed, "LWW."

Q What happened next in connection with your handling of the Buckley matter?

A I had a discussion with Mr. Wagman, to give him the benefit of my views, and he further gave me the benefit of his.

Q Then what did you do?

A I had discussions with either Mr. Holtzschue or Mr. Ryan.

Q Of Webster, Sheffield?

A At Webster, Sheffield, the attorneys for the Buckleys, and the substance of those discussions was that we were prepared to commence litigation unless we received a certification of the financial statement or an affidavit as to its truth and accuracy, and it was at that time, somewhere between March 27th of 1970 and April 16th of 1970, somewhere in that two and a half week period, that the attorneys at Webster, Sheffield said to me, "If you sue, there will be lodged 10b(5) counterclaims," 10b(5) being a lawyer's shorthand for regulations under Section 10 of the Securities and

Exchange Act of 1934.

I asked the attorneys at Webster, Sheffield what kinds of claims were these, and the only response I got was that they were substantial claims, but he would not further describe them.

Q This was in April of 1970?

A Somewhere between March 27th and April 16th.

Q Can you at this time state the name of the attorney at Webster, Sheffield who raised that question of 10b(5) claims?

A I can state two names and I cannot state which of the two: Either Mr. Holtzschue or Mr. Ryan, no one else.

Q What is the next thing that you did in connection with the Buckley matter?

A I am just trying to refresh my recollection on a date -- all right -- on April 16th I had a telephone conversation with Dick Miles. There may have been something before then concerning a telephone conversation that was less than the 15 minute period for which our firm kept time sheets. I had a telephone conversation with Mr. Miles on the 16th, and on the 17th of April I met at Newburger, Loeb on the Buckley case and on other matters, but in connection with the Buckley case I met with his assistant, Seymour Goldstein.

Q What did you and Miles and Goldstein do at that time, if anything?

A By that time there had been pulled together at Newburger, Loeb a folder containing various records pertaining to these accounts. There were the margin agreements, the customers' agreements for the various accounts. There had been a search -- there was the folder in which there would be any correspondence that would exist between the customer and Newburger, Loeb, and there were copies of the monthly statements that Newburger, Loeb had sent to David and Mary Buckley in respect to the joint account of David and Mary Buckley -- there were a series of accounts -- they had a joint account together and each one had a cash account and each one had a margin account and there may have been another account there, but there were at least five accounts, and we met to look at these agreements to see whether we could determine by looking at the monthly statements what the nature of these so-called 10b(5) claims could be, and we looked to see whether there was any correspondence back and forth between the Buckleys and Newburger, Loeb where we could find out what these threatened counterclaims would be, and we found nothing.

What we found was an active speculative account with a large number of transactions and we found no discretionary power, as would be required by the rules of the New York Stock Exchange, Rule 400 and something, 408, I think, that would require that a power of discretion being in writing, and we confirmed that all of the various --

MR. SHAW: Objection, your Honor. This is not testimony. He is just talking about his state of mind, not what was said.

THE COURT: He is saying what they were looking for and putting it against what he understood the requirements to be, which has been the subject of examination and cross examination of earlier witnesses.

MR. SHAW: He is going on as to his opinion although he has not been asked for his opinion or the basis for it.

THE COURT: He is saying why he looked for certain things. Go ahead.

A We ascertained that each of the customers' agreements and margin agreements contained provisions which would permit Newburger, Loeb to commence an arbitration against the Buckleys in order to recover these monies rather than to go into court.

In order to commence an arbitration there must be a contractual agreement to do so and we were looking for that agreement because arbitrations are frequently shorter than court litigations and we wanted to have the day of reckoning quickly with the Buckleys so that we could recover on the debit balance, and there were such arbitration agreements and the right to arbitrate was there.

Q During the course of this meeting, did the name of Gross & Company come up?

A Yes, it did. My recollection is that --

MR. GRUTMAN: That is an answer, your Honor. There is no further question, no further response needed.

THE COURT: Put your next question.

Q How did it come out?

A On most, and perhaps all, of these monthly statements there appeared to be a stamp that said Gross & Company or "Through the courtesy of Gross & Company," or some type of a stamp, where the name Gross & Company appeared and I said to either Dick Miles or Seymour Goldstein, "What is Gross & Company?"

And I was told that Gross & Company was the non-clearing firm through whom the accounts of David and Mary Buckley had been introduced to Newburger, Loeb, which carried the accounts. These were actually accounts of Newburger, Loeb but they were carried by Newburger, Loeb for a non-clearing house known as Gross & Company, and I believe I was also told at that time that Gross & Company was a non-clearing firm in which Charles Gross had been a general partner and that Charles Gross was at that time a partner of Newburger, Loeb and Gross & Company did not exist any more.

Q At that time did you know Charles Gross?

A I had never met Charles Gross. I had spoken to him on the telephone once, when he called to tell me off about something.

Q Having to do with another matter?

A Yes. He said that on another matter which involved --

MR. SHAW: Objection, your Honor.

THE COURT: Sustained. Nothing to do with this case?

THE WITNESS: No.

Q We don't care if you were guilty or not, Mr. Silverman. Have you now told us everything that happened at that meeting between yourself and Miles and Goldstein?

A We did discuss the advisability of interviewing the registered representative who handled the account and we said that there would have to be a point where we would have to interview the registered representative, and we also discussed the subject of what should be the size of the claim against the Buckleys. We were not really sure at that time. Westec had opened somewhere around May of 1969, after a suspension of several years, it had opened at a certain price, 11 or 12, or something like that, and at the time we were talking about commencing the arbitration the value of the stock was 4. So the real question was, in suing should we sue for the debit balance in the accounts, the money owed, treating the stock as worth only 4, or should we sue for an amount, treating the stock as worth 12, which would be a recognition that Newburger, Loeb was under an obligation to have sold out on the opening, after the suspension, or should we sue for the difference between the debit balance and the value of Westec's stock at the highest value Westec's stock had reached within a reasonable time after it opened.

There were problems as to how much we should sue for. So I asked Mr. Miles and Mr. Goldstein to please prepare for me an analysis showing what the debit balance would be if we valued Westec at 4, or whatever the value was when we sued, or, an alternative calculation, if we valued the Westec at the value it was on the day it opened and, as an alternative evaluation, if we valued Westec at the highest value reached within a reasonable time after the stock had opened, to see what the range, what the differences in the claim against the Buckleys would be, and I was told that that analysis would be prepared and forwarded to me.

Q Did you ever get such an analysis?

A Yes, I did.

Q I show you a copy of P-22 in evidence and ask if that is the analysis which you received?

A Yes, it is. As a matter of fact, I see some handwriting of mine on it.

Q Would you please tell the jury what debit balance P-22 shows on the different summations as to the price which should be credited for Westec?

A P-22 is really divided into three areas. On the left-hand side is an area showing dates and debit balances in the account and market values of the Westec stock with a net deficit, and then it is broken down into a column for David Buckley and a column for Mary Buckley, for their various accounts.

My recollection is there wasn't very much in the joint account, or if there were, it was divided between the two columns. First is shown the debit balance in the account in October 1966 with all securities dated except the Westec, which couldn't be. That had been suspended at that time there was a total deficit in the account of 289 --

MR.MANDEL: I have one extra copy which I might hand to some of the jurors, your Honor.

THE COURT: All right.

Q Mr. Silverman, would you please continue.

A So that there was a deficit in the account in October of '66 --

A May I use round numbers, your Honor?

THE COURT: Go ahead.

A -- of $290,000. On May 15th of 1969, which was the date of the first available price after Westec was reinstated, at that time it was 7-5/8, there was a total deficit in the account, giving credit for the Westec had it been sold at 7-5/8, of $256,000, roughly, and it should be observed that that includes interest which had accrued on the debit balance from October of '66.

The next is taken at a date of June 23, 1969, when 2,500 shares of Westec had been received from Merrill Lynch. That was received as a part payment against the debit balance, the Buckleys transferred this Westec into Newburger, Loeb, and on that day Westec was at 6 and there was a total deficit in the account net of the Westec had it been sold of $263,000, roughly.

On May 5, 1970, which was at or about the time this schedule was prepared, there was a deficit in the account of $332,000 and on that day Westec was at 3-1/8, and then I had also asked what would the deficit be had Westec been sold at the highest value from the day it opened until May 5, 1970, or the date this was prepared, and the highest value was reached at some point, I don't know the date, 11-3/4, and if you calculated the debit balance on that day, it would have been a debit balance of $213,000, total, for both accounts.

As of May 5, 1970, these various debit balances included total interest on both accounts of $85,688. So that these debit balances do include interest up through the date of the calculations.

MR. GRUTMAN: Your Honor, I must object. I don't see the relevance in a case as long as this of a laundry list. The ultimate figure is the amount they brought the arbitration for and to go into this thinking is wasting time, I think.

THE COURT: This has to do with what one law firm did and its views about the Buckley claim. There has been proof here as to what another law firm did and its views on the Buckley claim.

MR. GRUTMAN: They made a claim for Newburger, Loeb, your Honor --

THE COURT: I overrule the objection.

Q After you received Exhibit 22 what did you do next?

A The next thing I did was in early June, or thereabouts, an arbitration demand was prepared.

Q Was it served at that time?

A No, it was not.

Q Who authorized you to commence arbitration against the Buckleys?

A Dick Miles.

Q When did he give you that authorization?

A At or about May 5th, 6th, 7th, just about the time he sent this to me (indicating).

Q You said you prepared an arbitration demand when?

MR. SHAW: May 6th, 1970.

A No, I did not say May 6, 1970.

MR. GRUTMAN: June.

A It is dated June 10, 1970. So it might have been prepared on June 9th, and it was prepared for the total debit balance --

net of a hypothetical sale of Westec stock on that day at that day's value and inclusive of interest through May 5, 1970.

Q Beginning when, interest beginning when?

A Whatever accrued interest had been in the account from whenever the first accrual was. I don't know whether all the interest had been cleared up in 1966 or not.

Q At the time you filed the arbitration demand, P-25, did you yet know what the Buckley claims were?

A No.

Q What was the total extent of the information which you had about their claims?

MR. SHAW: Objection, your Honor. This is in the nature of summation or argument, a reprise of the testimony.

THE COURT: I take it that question means what was his state of knowledge as of that date about the claims?

MR. MANDEL: Yes.

THE COURT: Assuming it is that, which I took it to be, the objection is overruled.

A All that I knew at that time was that there was a threat of substantial, large so-called 10b(5) counterclaims.

Q Do you have any idea or had you been given any hint as to what the 10b(5) counterclaim could be?

A No, sir.

Q Are there numerous different kinds of 10b(5) claims?

A Yes, sir.

Q After you filed the arbitration demand, what is the next thing that happened?

A The next thing that happened in this case happened while I was on vacation.

Q And what was that?

A Webster, Sheffield, representing the Buckleys, requested that our firm extend their time to make a motion to postpone the arbitration so that they could litigate their 10b(5) claims in court, and we consented and gave them that extension.

Q Then what happened?

A They did not go through with the possibility of staying the arbitration, but on or about August 13th, in mid-August, or thereabouts, they filed an answer to the arbitration demand and the answer contained what Webster, Sheffield described a- a setoff and contained two counterclaims.

Q I show you Exhibit P-28, a copy thereof,

AFTERNOON SESSION

2:15 p.m.

(Jury present.)

ARTHUR C. SILVERMAN,

resumed the stand and testified further as follows:

DIRECT EXAMINATION

BY MR. MANDEL (Continued):

MR. MANDEL: We have a missing member, your Honor.

MR. GRUTMAN: I will sit in for Mr. Shaw, your Honor.

THE COURT: Very good.

(Mr. Shaw enters courtroom.)

Q Do you have a copy of P-28, the Buckley answer set off in counterclaim before?

A I have a copy of the answer set off in counterclaim. I din't know if it is the precise photocopy of P-28.

Q After you received it as attorney for Newburger, Loeb & Company, did you study it and evaluate the answers set off in counterclaims?

A Yes.

Q Did you reach certain conclusions and judgments based on your study?

A Yes, I did.

Q Will you state what they were?

MR. SHAW: Objection, your Honor.

THE COURT: On what ground?

MR. SHAW: First of all, it is not clear as to what the basis for the conclusion or opinion was and, secondly, I think it is irrelevant in this case, five years later, as to what an opinion by an attorney based upon a pleading which certain imperfect amounts of information conveyed to him was -- what is the relevancy right now --

THE COURT: Haven't we been taking a lot of proof from other attorneys?

MR. GRUTMAN: On the issue of good faith only, your Honor.

THE COURT: Mr. Ryan was asked by Mr. Grutman what his view of the claim was.

MR. GRUTMAN: I think your Honor received it primarily for the purposes of the good faith of Webster, Sheffield in asserting it and the additional proof adduced was on the good faith of the Finley, Kumble firm in prosecuting it on behalf of our client, but for this lawyer, who I submit has a conflict of interest -- this is not Newburger, Loeb's lawyer. This lawyer represented Charles Gross as a defendant.

THE COURT: He represented Newburger, Loeb at a plus factor, that the assessment made by the first lawyer is that this is so without merit that nobody could reasonably entertain this view.

THE COURT: That is certainly something you may go into on cross examination. I will overrule the objection.

A I studied the answer set off in counterclaims and observed that on the face --

MR. SHAW: Objection, your Honor. The question is what is his opinion.

THE COURT: Let me say what he looked at to focus his opinion.

A -- and observed that there were inaccuracies on the face of the claim, gross exaggerations within the context of the document itself and inconsistencies.

For example, in the set off the allegation was that on the day Westec opened the opening price was 11-3/4. In fact, the opening price, on the day of opening, was 7-3/8, four points lower.

There was the allegation in the set off that because Newburger, Loeb had failed to sell out the Westec stock on the opening, the Westec stock was worthless for all purposes. That is how the set off of $159,650 had been calculated, with the attorneys giving no value whatever to the value of Westec on the day this set off was filed.

In the first counterclaim, which was the churning counterclaim, and throughout the entire document, there was not a mention of 10b(5), there was not a mention of the Securities and Exchange Act of 1934 or the Securities Act of1933. There was no allegation whatever of violations of the federal securities laws.

There was the allegation in the first counterclaim, which was the churning counterclaim, that this account had been turned 40 times and yet if you did just a little bit of mathematical calculation from the face of the numbers used by the Webster, Sheffield firm, the maximum you could get out of their own numbers was 10 times.

Q 10 times during what period?

A 10 times during a four and a half year period.

In the second counterclaim, which was a claim which charged bad advice, there was the claim that Jordon, the customers man, had inside information from Westec, he had some information from insiders, and his advice was poor because he shouldn't have believed the inside information.

The allegation was he knew too much and he shouldn't have believed what insiders who were supposed to know told him. That was unusual.

Then in the second counterclaim there was an allegation which tended to defeat the first counterclaim. The first one was the churning one. In the second counterclaim it was stated that respondents decided not to sell their Westec stock -- the words are "two days after respondents' decision not to sell" --

Q Who are the respondents?

A The Buckleys. That was an indication that control of the account was in the Buckleys, not in the customers man, which was a sine qua non, an essential, of a churning claim. So that within the face of this document there were inconsistences, gross exaggerations and allegations which, frankly, were destructive of their own claims, and the judgment I reached was --

Q Did you take any other facts into account in reaching your judgment?

MR. SHAW: Objection, your Honor. The witness was interrupted in the middle of giving an answer to the question.

THE COURT: Let him finish.

A At the time I received this, I was studying this document within its four corners and trying to reach conclusions about the claims based upon what the Buckleys' lawyers said, disregarding anything else.

I reached the conclusion that the registered representative should be interviewed, must be interviewed, but was of the preliminary view that this was a counterclaim to simply forestall payment of the debit balance.

MR. GRUTMAN: Your Honor, the question called for also his opinion about the offset and he has not given that yet.

THE COURT: Go ahead, next question.

Q Did you take any other facts outside the four corners of the piece of paper into mind in making your evaluation of it?

MR. SHAW: Objection. The witness just answered a question saying he reached an opinion based upon the four corners and now he is being led. I imagine the next question is, "At another time" --

THE COURT: Overruled.

A There were other factors I was aware of at that time which confirmed my view, but I would have to say that I didn't really consider the totality of the facts I knew until after the interviewing of the registered representative

Q Did there come a time when you communicated your judgment of the Buckley answer set off in counterclaim to the partnership of Newburger, Loeb & Company, your client?

A Yes, there did.

Q When did that time come?

A After the interview of the registered representativ

Q When did you interview the registered representativ
How did that come about?

A After the answer set off in counterclaim had come in, which I think was on August 13th, I tried to reach Dick Miles. He was on vacation. I then asked to speak to Charles Gross. He was the managing partner of the firm, or so I thought. I spoke to Charles Gross and learned in that conversation --

MR. SHAW: Objection, your Honor.

THE COURT: No, overruled.

MR. SHAW: Hearsay.

THE COURT: Overruled.

A -- that Charles Gross in fact had ceased being the managing partner of the firm two days before. We discussed the counterclaim set off and answer for a period of time -- my time sheets reflect somewhere between 22 and 30 minutes -- and at a later point -- during that conversation and at a later point I stated that should interview Jordon. At the later point, when I said this to Dick Miles, after he was back from vacation, that he should make arrangements for us to meet with Jordon, I recommended that Gross make those arrangements because I did not know Jordon, Miles did not know Jordon and we wanted someone to make the arrangements and be present whom Jordon knew so that he would feel more comfortable in the meeting during the interview and he wouldn't be surrounded by people who didn't know him and whom he didn't know.

Consequently, the meeting was arranged by Charles Gross and was set for the offices of Newburger, Loeb and September 15th.

Q Did that meeting take place?

A It did.

Q Who was present?

A Mr. Jordon, Mr. Gross, Mr. Miles, and I.

Q What transpired at the meeting?

A The meeting was about two hours. I and Dick Miles interviewed Mr. Jordon in depth. I took notes of that meeting, and later transcribed those notes. We were interviewing Jordon directing ourselves to the claim of bad advice, the alleged advice of Jordon for the Buckleys not to sell their Westec stock, and we were focusing also on the churning counterclaim.

Q What did Jordon say?

A I don't have the notes of the meeting--

Q Did you later transcribe your notes?

MR. SHAW: He testified that way.

THE COURT: Yes, he says he did.

Q What happened to those notes ultimately?

A Those notes were transcribed, they were typed, they were placed in the file, as best I know, and those papers, together with the rest of the file, except for intraoffice communications, was transferred to Larry Berkowitz on November 11th of 1970.

Q What is your recollection of the meeting between yourself, Gross, Jordon and Miles?

A I questioned Jordon at length about who Buckley was and whether or not Buckley -- the Buckleys controlled their own account or whether this account was controlled by the registered representative, and what I learned was the following:

Buckley was a fairly well-educated fellow, he was the son of a wealthy person who was a high-up official in a large American company, and I heard the name of the company Georgia-Pacific and I think that was the name mentioned, that Buckley himself was an executive with the multinational company, Lever Bros., that he had several brokerage accounts and had met Jordon at a brokerage house that Jordon was at before he went to Gross & Company; that Buckley had accounts at other brokerage houses, or an account at other brokerage houses. I was told he subscribed to financial magazines or services, that he was frequently on the telephone with Jordon with stock tips, is the word I would describe it in layman's fashion, things that Buckley had heard about that he wanted to discuss with Jordon, that there was a lot of give and take in their discussions; that every decision in every transaction in that account was a transaction that was authorized by Buckley; that there never was a time when there was a transaction that Buckley didn't discuss and didn't approve.

I learned that Buckley was interested in speculation, he was not a long-term investor for income and dividends, that he was a young man and wanted to make a lot of money and, accordingly, he was prepared and was willing and did take risks to do that.

I learned the accounts were quite well leveraged. They were margine accounts, two of them, and Buckley made use of calls, which are options to buy stock at certain prices, and that Jordon was generally a sophisticated person.

THE COURT: You mean Buckley.

A Buckley was generally a sophisticated person. One thing stands out in my mind, that Buckley attended a breakfast for securities analysts that was given by Westec because Buckley himself wanted to hear from the people at Westec about Westec, in which he had a fairly large position.

I learned that Buckley had had a lot of money invested in Syntex earlier and had ridden Symtex up and he didn't sell out and he rode it down, and he had also ridden Westec up and he rode that down until the point when it was suspended.

What I learned essentially was that the Buckleys controlled the account, they received the confirmations of each and every transaction in their accounts. I asked Jordon whether he had ever heard anything from the Buckleys concerning claims against Jordon, claims against Gross & Company, claims against Newburger, Loeb relating to bad advice relating to churning, and Jordon said that Buckley had never once complained.

In fact, I believe at the time I interviewed Jordon he told me that Buckley was still a customer of Jordon's at another brokerage house.

Q After the meeting at which you discussed these matters with Jordon and Gross, did you and Mr. Miles have a separate private conversation?

A We did.

Q What was the substance of that conversation? First, what was Miles' position at that time.

A At that time the precise name I don't recall, but I think it was director of Compliance or head of the Compliance Department.

Q Of Newburger, Loeb?

A Yes.

Q And the date is September 15, 1970?

A Yes, it is.

Q Please go ahead.

A First, Dick and I discussed the nature of the claims themselves. On the question of the set off -- the set off was that portion of the Buckleys' claim where they said since Newburger, Loeb didn't sell out Westec on the opening, Newburger, Loeb can't hold the Buckleys for the loss in value of Westec after the opening. That is the set off.

Q Let me interrupt:

Did the set off have anything at all to do with actions by Gross & Company?

A None whatever. The set off had only to do with what Newburger, Loeb allegedly failed to do after Westec opened in May of 1969 and by that time Gross & Company was out of business and Charles Gross himself was a partner of Newburger, Loeb.

Q Did you have any discussion with Miles about who at Newburger, Loeb had made the decision not to sell out the stock?

A Yes. Although the discussion with Dick Miles as to who made the decision not to sell out was not at the September 15th meeting -- it was earlier, and the answer was Leo Stern.

Q Go back to your discussion on September 15th, pleas

A On the question of the set off, I was of the view that the Buckleys had a good set off, that Newburger, Loeb should have sold out the account on the opening. Dick Miles was not so sure. He said that there was a difference between something called maintenance margin requirements, one being governed by the securities law and the other by the rules of the Stock Exchange.

He was not so sure. We differed somewhat on that but generally w-re of the view that the Buckleys had at least a meritorious claim that the stock should have been sold out in May of 1969 when the trading in Westec resumed.

On the churning counterclaim, Dick Miles was of the view that what we had learned from Jordon not only completely reenforced our prior view but there was justno evidence at that point of any control whatever by the customers man or domination by the customers man over the customer, that everything we had learned showed the customer to be sophisticated, intelligent, knowledgeable in what was going on, having made the decisions himself and his objective was speculation, profit, a young man seeking quick profits as opposed to an old lady seeking income and there was no reason to believe at that point that there was anything to the churning claim.

On the question of the bad advice claim, which had to do -- not had to do, but the Buckleys had alleged that Jordon should not have believed the inside information from Westec and it was in refusing to believe tha inside information in giving advice to hold, that this was bad advice, and we conclude all there was here was a claim that in hindsight the customers man was wrong.

When you look backwards, if he had said, "sell" it would have been better advice than to hold, but there was nothing in the law or facts to suggest this was an actionable claim at law.

Customers men are not insurers of their customers' account and all we had here was Jordon giving his best advice. In fact, I recall something else out of the meeting with Jordon. Jordon's family had a position in Westec and we took that into account, that he didn't sell out the position of the members of his own family, which showed that he believed whatever advice it was that he rendered to the Buckleys to be true.

If he didn't believe that advice, he would have sold out the position that his own family had. So we saw no merit at all, and I recall Dick Miles using this phrase, that he thought the counterclaims were knee-jerk ractions, merely the reaction of a customer trying to forestall and stave off what ultimately had to come to pass, which was that Newburger, Loeb had to be paid or the Buckleys would have to do something to avoid payment, like, perhaps, bankruptcy, if that came to pass.

We had a further discussion after we discussed the answer set off in counterclaims.

I said to Dick Miles, "We have the right to claimover against Gross & Company and to claimover against Jordon. There may be some technical impediments to the claim," I said, and I was not sure we could bring in Gross & Company and Jordon in a proceeding before the American Arbitration Association, but I was fairly certain if we did, they would not object, and I said, "If we do that, Dick, we have that right in case there is some kind of miscarriage of justice here, to claimover against Gross & Company and Jordon on the counterclaims, but the question really is are we going to be lending some type of credibility, some type of strength to the Buckley claim that just isn't there, are we going to dignify their claim if we claimover against Gross & Company and Jordon," and Miles said he thought that we would, but he would check further and get back to me.

Q When you say he thought you would, what did he mean by that?

A It was Miles' opinion that if Newburger, Loeb were to file a claimover against Gross & Company and against Jordon on the same claims that the Buckleys had asserted against Newburger, Loeb, that it would be to lend dignity to a frivolous claim.

Q What did Miles say to you after that?

A Dick Miles got back to me after that and said to me that it was the decision of the partnership not to claimover.

Q Did he name the partner who made that decision?

A He did not.

Q When he gave you that decision of the partnership, did he give you instructions what to do about the arbitration

A Yes. The instructions were to go forward.

Q Go forward and press the arbitration against the Buckleys?

A That is correct.

Q What happened next?

A Well, what happened next is a little misleading because some things happened before the meeting with Jordon. The American Arbitration Association had sent out lists of proposed arbitrators and lists of dates and the work we were doing on that, sending the list of arbitrators down to Newburger, Loeb so that all the partners could look over the proposed names to see whether there were any conflicts or difficulties -- what was going on from that earlier point until the time when we turned over the file to Larry Berkowitz, on November 11th, was a back and forth correspondence between the attorneys for both sides, with the Buckleys' attorneys generally rejecting the lists of arbitrators, except for one arbitrator who was unacceptable to Newburger, Loeb, and at some point the asspciation appointing an arbitrator and there was that type of back and forth, the preliminaries to picking an arbitrator and picking dates for arbitration.

Q Do you happen to know whether Charles Gross had given his notice of withdrawal prior to the date on which you were told by Dick Miles that a decision had been made not to make a claimover?

A As of that date, I did not know. I subsequently learned that he had.

Q You learned that he had what?

A Given notice of withdrawal effective September 30th of 1970.

Q When did he give the notice of withdrawal?

A I think he gave the notice of withdrawal in late August of 1970.

Q About what date was it that Miles told you that the partnership had concurred in his decision and yours not to make any claimover?

MR. SHAW: Objection, there is no such testimony. The only testimony was that Miles told him not to claimover.

THE COURT: Right. What is the date of that?

THE WITNESS: Sometime between September 15th -- sometime in the two-week period after September 15th.

Q You say on November 11th you turned the file over to Larry Berkowitz?

A That is correct.

Q Did the file contain the arbitration demand?

A Let me tell you what the file contained. The file contained all clients' papers. By clients' papers I mean any documents which we would have received from Newburger, Loeb, photocopies of the account, the monthly statements, there would be the agreements, the customers' agreements between the Buckleys and Newburger, Loeb --

anything of that type.

There were also the litigation papers, which in this case consisted of the demands for arbitration and the affidavit attesting to its proper service upon the Buckleys, as well as the answer set off in counterclaim. There was all correspondence in the case by and between anybody. There would be the memoranda of any meetings that I had with others, which in this case were only one, and that would be the memorandum of the meeting with Jordon on September 15th, and basically I think that was what the file consisted of, of what was turned over.

Q Do you happen to remember about how many pages your memo of the meeting with Jordon was?

A My recollection is about four single-spaced pages.

Q Typewritten?

A Typewritten pages.

Q Have you seen those papers, from that day to this?

A It is a question I can't answer. I have not seen those papers since, but I cannot say that on the day they were turned over every one of these papers was in the file. I can't say I saw each and every letter, I can't remember that. I can only say that all of our papers in the file were turned over except for intraoffice communication. I cannot say that I physically saw any particular paper in the file because I just don't recall.

Q As of November 11th, when you turned the file over to Berkowitz, had there been any change in the instructions to go ahead with the arbitration full blast?

A No.

Q I should ask one further question:

On November 11th, when you turned over the papers to Mr. Berkowitz, did you then cease to represent Newburger, Loeb & Company as its attorney in the arbitration with the Buckleys?

A Yes.

Q Was that formalized by substitution with the American Arbitration Association?

A A letter was sent to the American Arbitration Association. I don't think they required a formal substitution as is required in a court proceeding.

Q I direct your attention to December 10th and ask if you attended a meeting -- that is December 10, 1970 -- and ask if you attended a meeting on that day?

A Yes, I did.

May I just have a few moments?

Q All right.

(Pause.)

MR. MANDEL: Your Honor, may I ask if it would be appropriate for me to state at this time that we are now moving from the churning matter to some other matters.

A I did.

Q Where was the meeting that you attended?

A At the law firm of Stroock, Stroock & Lavan. I think they are at 61 Broadway.

Q What was the subject of the meeting?

A The subject of the meeting was a crisis which had developed at Newburger, Loeb, occasioned by notice of withdrawal of capital that had been given by limited partners, and on December 10th there was a meeting called at the offices of Stroock, Stroock & Lavan to discuss further what was happening at Newburger, Loeb.

Q Whom did you represent at that meeting?

A I represented Jeanne Donoghue and Mabel Bleich.

Q Who were limited partners of Newburger, Loeb & Company?

A That is correct.

Q Had they given notices of withdrawal by that date?

A No, they would not.

Q Do you happen to know how many partners had given notice of withdrawal prior to that December 10th day?

A Limited partner?

Q Yes.

A I think almost all of them, except for Jeanne and Mabel. If they had not by December 10th, they gave it shortly thereafter.

Q Do you recall who was present at that meeting?

A I don't know that I can name all the names. I walked into the meeting and it was laready going on and there were an awful lot of people in a large conference room. I recall some of the people who were there. There at the meeting was a lawyer by the name of Max Freund, a seni partner at one of the eminent New York law firms.

Q What is the name of that firm?

A Rosenman, Colin, Kaye, Petschek, Freund & Emil and he is the Max Freund in the name of the firm.

Robert Newburger was there. A man by the name of Gutman, I think Daniel Gutman was there. Arthur Richenthal, a lawyer, was there. Mr. Risher and Mr. Muh, for a period of time, were there.

I am going to refer to my notes and see if it refreshes my recollection as to others.

MR. SHAW: Your Honor, could those notes be marked for identification? It just struck me that he is refreshing his recollection by looking at certain documents.

MR. MANDEL: The notes are 28-G marked on the deposition. I have no objection.

THE COURT: Then there is no problem at this point.

MR. GRUTMAN: If we have a whole series of notes, can we have them all marked?

THE COURT: No, we will deal with that seriatim as we go along.

MR. MANDEL: That is Defendants' Exhibit HH for identification now, your Honor.

MR. GRUTMAN: May I see that now?

THE COURT: No, we will proceed with the examination. If there comes a time when you want to look, you will have full opportunity.

THE WITNESS: Your Honor, this is 28-G marked in my deposition, copies of which were given to the Finley, Kumble firm.

MR. GRUTMAN: I want to be sure I have what he says I have, your Honor.

THE COURT: Go ahead, Mr. Mandel.

Q Will you explain or continue -- I think you said you would look to see who else was at the meeting.

A A Mr. Steefel, I believe, was there, Mr. Richards from the New York Stock Exchange, I recall him and see his name here, Mabel Bleich was there, although while I was representing her I had never met her before and I didn't know she was there until later, A Dr. Shulman, a limited partner, was there, and there were a large number of other people who were there. I don't have them all. There may have been a sign-up slip, but, if so, I didn't get a copy.

Q Can you describe what happened at that meeting?

A Yes. When I walked into the meeting, Mr. Gutman was addressing the meeting and he was identified as a person who had previously been engaged by a brokerage house known as Charles Plohn & Company and I think that he had liquidated Plohn was the liquidator for Plohn and they were discussing generally the state of affairs at Newburger, Loeb, and in a general sort of way, while the meeting was quite long, there were certain subjects discussed first of all, what was the financial state of Newburger, Loeb. There were large losses that were being described.

It was stated that the capital of limited partners was being eaten away, somebody said that the capital --

MR. GRUTMAN: No, that is not correct -- sorry, your Honor. Forgive me.

THE COURT: What is this?

MR. GRUTMAN: Your Honor, I was reading what I thought was the document and I think Mr. Silverman erred.

THE COURT: You know, it is inappropriate to interject at such a point.

MR. GRUTMAN: It was only a slip of the tongue, your Honor. I am sorry.

A Looking at this document, what I said before is entirely correct and not erroneous. There was a discussion about what should be done. The New York Stock Exchange said that they wanted a plan of something from Newburger, Loeb and listed certain requirements they want Newburger, Loeb to comply with, and there was a series of discussions, and it was a long meeting and perhaps you can direct me to certain areas, Mr. Mandel.

Q What were the requirements stated by the New York Stock Exchange?

A The New York Stock Exchange essentially said there were three things they wanted -- essentially, but said the -- three things they wanted:

One, they wanted management personnel who were qualified. Fred Kayne, who had been the managing partner of Newburger, Loeb after Charles Gross had himself resigned over a month before and the New York Stock Exchange said, "We want some management people who are qualified."

The second thing they wanted was that all of the scheduled withdrawals of capital from the firm -- the limited partners had given notice of withdrawal and the Stock Exchange said, "We want the withdrawals deferred for a year, to the end of 1971."

Q The limited partners?

A Yes.

The third thing they wanted was they wanted Newburger, Loeb to maintain something called net excess capital, or excess net capital. That is a phrase the Stock Exchange uses. They wanted excess net capital of $400,000 plus whatever capital was to be withdrawn within 120 days.

If no capital was to be withdrawn, they wanted the firm to maintain excess net capital of $400,000, qualifie management personnel and scheduled withdrawals of limited partnership capital postponed for a little over a year, from September 10th to the end of 1971.

Q Was there any question raised at that meeting with regard to the employment of Risher and Muh?

A There was.

Q What was that?

A There came a point not long after I got there when Risher and Muh had been asked by Max Freund -- Max Freund was the lawyer representing -- I understood him to be representing the partnership or at least Robert Newburger --

Q Was Robert Newburger a general partner?

A He was a senior general partner, and he together with his brother Andrew were the name Newburger & Newburger, Loeb.

Max Freund said that Risher and Muh had done things which were detrimental to the interests of the partnership, that they were trying to seize the partnership for themselves, and he wanted them to leave the meeting and he asked them, in an angry tone, to leave the meeting --

MR. GRUTMAN: Your Honor, I object to this. It is not binding on us. It is pure hearsay. He is not a party, not a lawyer representing anybody at this table. It is rank hearsay and should be struck.

THE COURT: He was present, he is here as a witness, Risher and Muh are parties to this action.

MR. GRUTMAN: But the statements made by them, whether they are present or not, is binding on us?

MR. GLATZER: It was said by Mr. Freund.

THE COURT: In their presence.

MR. SHAW: Along with many other people. Does that make it admissible.

THE COURT: Certainly as to them.

MR. GRUTMAN: It is not binding on Finley, Kumble.

THE COURT: I will sustain that objection as to Finley, Kumble.

THE WITNESS: I don't know if Mr. Persky was there or not --

THE COURT: I will sustain as to Risher and Muh, at this point.

Proceed.

A They did leave the room. There was a discussion -- you are talking about Risher and Muh at this time?

Q Yes.

A At a later point, toward the end of the meeting, they were asked to come back in.

Q Was there any question raised about Mr. Persky at that meeting?

A There was a question raised about Mr. Persky and about the Finley, Kumble law firm.

Q What was that question?

MR. GRUTMAN: I object. Who raised the question? You can't take hearsay floating in the air and stick it on us.

THE COURT: Who raised the question, Mr. Silverman? Do you remember?

THE WITNESS: I don't know who raised the question. I only know who made the response. Max Freund responded but I don't know who raised the question.

THE COURT: Who was Freund representing?

MR. SHAW: Robert Newburger or the partnership, is the testimony.

THE WITNESS: The general partners and the partnership, I believe.

THE COURT: Objection overruled.

A The question was whether it was proper for the Persky firm, who were representing persons who were interested in taking over the partnershp assets and the partnership business -- whether it was proper for the Persky firm to also be representing the partnership itself in connection with various litigations at that time and in connection with day to day matters, and Max Freund said he didn't want to replace the Persky firm at that time, he would not consider changing the Persky firm unless and until the firm got on its feet.

Q Did he say he would not consider accepting the representation --

MR. GRUTMAN: This is leading, your Honor.

THE COURT: Sustained.

Q Were there any financial statements or any financial information given out at that meeting?

A Well, there was financial information in the sense of oral statements, people saying things. There were no financial statements in the sense of anything in writing.

Q What was said and by whom?

A When I walked in Mr. Gutman was stating certain things about Newburger, Loeb and he talked about what had happened in November and what had happened in October and what he thought might happen in December.

Q What did he say?

A He said that the November operating loss at Newburger, Loeb was $160,000 to $180,000, that November revenues were half of October revenues.

However, he believed that with respect to December that if the costs of November were duplicated in Ddcember and if the October revenue were duplicated in December, he said that in December revenue would be running at the October rate of $20,000 per day.

Later on in the meeting Risher, Muh -- later on at the meeting is still at the beginning of the meeting, and this was before Risher and Muh were asked to leave -- Risher, Muh or Gutman, and my best recollection is that it was Risher or Muh, said that it was their opinion that all of the capital of the limited partners were gone and that they were starting to erode the capital attributable to subordinated lenders, that if the losses were not topped there would be no capital at all by the end of the first quarter of 1971.

There was also a general discussion amongst several participants that despite these oral statements that were being made, nobody really knew what was happening at Newburger, Loeb, nobody was able to get a financial statement out of Newburger, Loeb, in the sense of something in writing, what were their assets, liabilities, losses, and several people at the meeting questioned whether what they were hearing was right or wrong.

As far as the financial information was concerned, there was a general state of confusion on the part of many participants --

MR. GRUTMAN: I object to the characterization made of his opinion, your Honor.

THE COURT: Strike out that characterization.

A Although it was the statements of Risher and Muh that the financial situation of Newburger, Loeb was desperate --

MR. SHAW: I object. This is not testimonial, this is in the nature of a narrative. He is not saying what person said what and this last sentence is an illustration, people said this and that.

THE COURT: The very last sentence he said who said it.

MR. GLATZER: He used Risher and Muh as if they were one and they are two separate individuals and he doesn't seem to know which one said what and I think it is important as to which one said it.

THE COURT: Do you remember?

THE WITNESS: I would say I generally considered the team of Risher and Muh to be the same and I don't know who said --

Q Let me ask this --

MR. GRUTMAN: That is a motion to strike.

MR. GLATZER: There are two individuals and also a corporation, your Honor. You have a mixed up bag and I don't think --

THE COURT: Both Risher and Muh were at that point operating officials of Newburger, Loeb, is that correct?

MR. MANDEL: Yes, that is correct.

MR. SHAW: No, they would be hired as consultants by Newburger, Loeb and they had a consulting firm, I believe. They were operating as probably the managing partners of Newburger, Loeb.

THE COURT: I will strike the testimony --

MR. GRUTMAN: No, they couldn't have been -- they were fired as of this day, your Honor.

THE COURT: What was their status, please?

Q Do you know what their status was, the status of Risher and Muh, on that day? Were they operating managers of the partnership or --

MR. SHAW: Objection. Leading.

Q If you know.

A My recollection is that it was stated at the meeting that they had been let go the day before.

Q What happened during the meeting?

A During the meeting they represented themselves as people who were interested in putting together a plan to buy the assets and business of Newburger, Loeb.

Q Were they rehired during that meeting?

A I don't --

Q You don't remember?

A I don't know.

MR. GLATZER: Your Honor, it is the same problem of "they".

THE COURT: That is not a problem on this score. I grant, however, the motion to strike what Risher and Muh said in that one clause that you are referring to at this point since there is no identification of either, but I am going to reserve decision on whether it is to be stricken as against any other party pending a clarification of who they were representing.

MR. GRUTMAN: They surely didn't represent Finley, Kumble, your Honor.

MR. ESTERMAN: Or Mr. Persky.

THE COURT: Do you know whether they had any connection with Newburger, Loeb & Company as of that date?

MR. SHAW: I think the problem is the precise hour and moment of the day.

MR. MANDEL: Mr. Shaw is right.

THE COURT: Let's await the event, then, and you can call to my attention that problem when we have established that.

Go ahead.

Q I think you said something about a group that was to try to form a plan to buy the company.

A Yes.

Q Who was to be in that group?

MR. SHAW: Objection, your Honor, and can't the question be, "What was said" from this point on?

Q Yes, what was said?

A There came a point when Risher and Muh were called back into the meeting --

MR. SHAW: Your Honor, I am going to object, because nobody is being identified as the speaker. The conversations are nct --

THE COURT: All we had was a statement about something that happened. They came back in response to somebody calling them. Let's go forward. If you want to ask about that on cross examination, you may.

A I must preface it by saying that I don't know whether it was Mr. Risher or Mr. Muh who made the following statement, but was one or the other. They said if they could make Newburger, Loeb viable and make a million dollars available to Newburger, Loeb, they would take over Newburger, Loeb and give the limited partners in excess of 50 cents on the follar as capital, that they would try to bring in as additional capital stock in the Bacardi Corporation, that they would have to liquidate part or all of the stock in the various accounts at Newburger, Loeb to provide cash necessary to run the business and they said they would be the active management of the new firm.

They said that they had brought in Mr. Berkowitz as the counsel for Newburger, Loeb, they thought he was good and they wanted to keep him on, and they said that Fred Kayne would be a part of the investment of Mr. Risher and that someone by the name of Jed Cohen who was a registered representative in the California office of Newburger, Loeb would also have a part of equity in this new company.

MR. GLATZER: I move to strike that answer, your Honor. It was preceded by a statement that he didn't know who said it.

THE COURT: Mr. Silverman, when these gentlemen were talking, how did that talk proceed? By that I mean, did one speak and then the other supplement the speech or did they confer,or how did it come to pass, when you used the word "they"?

THE WITNESS: My best recollection, your Honor, is that the spokesman was Mr. Risher.

THE COURT: When you say the spokesman --

THE WITNESS: Spokesman for himself and for Mr. Muh.

THE COURT: How do you arrive at that conclusion, that he was speaking for Mr. Muh?

THE WITNESS: He said so. When I say he said so, the spokesman was --

THE COURT: All right, I don't have to hear any more. Objection is overruled.

I will take it as against both of them on the theory that one is authorized to speak for the other, certainly in this conversation.

Go ahead.

Q Does Exhibit HH for identification represent the notes you took at the meeting?

A They do.

Q And those notes were made by you to the best of your ability to record what happened at that meeting?

A To the best of my ability, giving the seat that I had, against the wall, in the back of the room, yes.

MR. MANDEL: I offer it in evidence.

VOIR DIRE EXAMINATION

BY MR. GRUTMAN:

Q Do those notes represent your past recollection recorded?

THE COURT: No, I will sustain an objection to that. That is conclusory language.

MR. GRUTMAN: I would like to know the basis on which it is offered.

Q Did you make those notes as the discussion proceeded?

A Yes.

MR. GRUTMAN: I have no objection to the receipt of those notes.

MR. SHAW: May I see the notes, please?

THE COURT: You may. They are admitted against Finley, Kumble at this point.

MR. GRUTMAN: With Finley, Kumble's blessing, your Honor.

(Pause.)

MR. GRUTMAN: No objection, your Honor.

MR. SHAW: No objection.

MR. ESTERMAN: No objection.

MR. GLATZER: No objection.

(Defendants' Exhibit HH for identification received in evidence.)

Q Did you later attend a meeting concerning Newburger Loeb on December 17, 1970?

A Yes, I did.

Q Where did that meeting take place?

A Also at Stroock, Stroock & Lavan.

THE COURT: What was the date of this?

THE WITNESS: December 17, 1970.

MR. GRUTMAN: What was the number of that, the 28 series?

THE WITNESS: 28-I.

MR. MANDEL: I can't find my copy of 28-I for identification, in deposition.

MR. GRUTMAN: Neither can I.

(Pause.)

MR. MANDEL: Excuse me, your Honor, and ladies and gentlemen.

THE COURT: Go ahead.

BY MR. MANDEL:

Q Mr. Silverman, who was at the December 17th meeting?

A Among others, at the December 17th meeting were lawyers and limited partners, various limited partners -- shall I read the names?

Q Yes.

A Donald Newborg, who was a trustee under the last Will of Lester Newburger; George Levy, a trustee -- an executor under the last Will of Morris Newburger, Daniel Eisenberg, representing Gerald Frank, Willard Earl, a limited partner, I was there representing Jeanne Donoghue and Mabel Bleich, and Mabel Bleich was there, Jack Wachs, Sol Braun, both limited partners, Arthur Richenthal, an attorney representing Joseph Quarte, a limited partner, and Philip Shulman, a limited partner, and also there was Mr. Steefel from the Stroock firm, Mr. Risher and Mr. Muh were there, and I believe Mr. Persky was there.

Q What happened at that meeting?

A A plan for the so-called reorganization -- it was really a plan for the sale of the assets of Newburger, Loeb -- was being discussed. It was a plan which contemplated the sale of the assets of Newburger, Loeb to a corporation, the taking over by the corporation of the name Newburger, Loeb & Company, and the assumption by the corporation of certain liabilities of Newburger, Loeb, with a whole new structure as to who were going to be the people in control and who were going to have the ownership interests in the corporation.

Q What was said about that question, of who would be in control and have the ownership interest?

A If your Honor will permit me to -- there was an actual plan that was discussed and I am looking for it -- here it is.

MR. GRUTMAN: May I request that be marked for identification.

THE COURT: Yes. What is the next number.

MR. MANDEL: II.

THE COURT: We will deem it marked II for identification.

THE WITNESS: It has been previously marked 28-C, during my deposition, so that you may follow it.

A The new ownership would be comprised of Mr. Risher and Mr. Muh, Mr. Kayne, principally, and with the attorneys for Risher and Muh and the promotors in this transaction was Mr. Persky. It was contemplated the subordinated lenders to the Newburger, Loeb partnership would be subordinated lenders to the corporation, that the limited partners of the Newburger, Loeb partnership would be subordinated lenders also, on a lower scale, in the new corporation, and that somebody by the name of Mr. Aixala would put up a block of Bacardi stock in what is called a senior subordinated account for the new corporation.

So that essentially the actual ownership of the capital stock in the new corporation would be principally in the hands of new promotors.

Q Was anything said about the salaries for Risher and Muh?

A Yes. Salaries of Risher and Muh were to be $35,000 per year.

Q What function were they fulfilling?

A They were to be in the management of the new corporation. One was to become the president and chairman of the board of the corporation and their own consulting firm, Risher, Muh & Company was somehow to be merged into Newburger, Loeb Corporation, the successor corporation.

Q Was there anything said about debts of the general partners, or tax refunds?

MR. SHAW: Objection, your Honor, to incorporating that in one question. I think they are totally separate items which should be the subject of separate questions. In other words, I object on the ground of form.

THE COURT: Break it up.

Q Was there anything said about the debts of general partners?

A Yes. There were debts of general partners to Newburger, Loeb, the partnership. It was stated that the persons who were in deficit to the partnership owed the money to the partnership, that that indebtedness had to be secured by tax refunds which were to go back to these general partners and that the tax refunds would be assigned to the new corporation and that a portion of the indebtedness of the partners to the partnership would be relieved.

MR. GRUTMAN: Your Honor, I have the following objection: If the witness is purportedly telling us what is contained in a document, which is the exhibit marked Defendants' Exhibit II, I think the document marked for identification is the best evidence. When he uses a kind of floating antecedent, "they" I don't know who he is talking about.

Earlier in his testimony he referred to Mr. Persky as one of the promotors.

THE COURT: Let's not comment on that.

Do you have an objection?

MR. GRUTMAN: I object. If he is going to talk about the document, the document should be offered in evidence.

THE COURT: Let us make an offer of the document. Do you offer II in evidence?

MR. MANDEL: Yes, I do, but I also offer the witness' recollection.

THE COURT: Put the document in evidence and then see what the next question is.

Q This is what you have been talking from?

A From both that and from this (indicating).

Q Together.

THE COURT: You were talking about a written proposal?

MR. MANDEL: That is already in evidence.

THE COURT: No, it isn't.

MR. GLATZER: II is the proposal, your Honor.

(Discussion off the record at the bench.)

THE COURT: II for identification is offered in evidence.

MR. SHAW: I have already offered it in evidence, your Honor, and it is already in evidence as part of Exhibit 97.

THE COURT: It is received.

(Defendants' Exhibit II for identification received in evidence.)

THE COURT: Is this a good time to take a break?

MR. MANDEL: Yes, your Honor.

THE COURT: Ladies and gentlemen, we will take our recess at this point.

(Recess.)

(Jury not present.)

MR. GRUTMAN: Your Honor, there are a whole series of notes of various meetings which Mr. Silverman attended, the so-called 28 series on his deposition, I asked whether they represent past recollection recorded and he used them and I have no objection to receiving them, but the jury gets the impression that what Mr. Silverman

MR. GRUTMAN: I will produce it.

THE WITNESS: I have it here.

MR. MANDEL: What is the difference?

THE COURT: The objection is overruled.

It is received.

(Defendants' Exhibit LL and MM for identification received in evidence.)

MR. MANDEL: I am reading to the jury from MM.

(Mr. Mandel reads to the jury from Defendants' Exhibit MM in evidence.)

MR. MANDEL: I am now reading Exhibit LL.

This is the same letter submitted by Mabel Bleich over her own signature.

THE COURT: Very good.

Q Did you attend a meeting on December 30th?

A Yes, I did.

Q Where was that?

A That was a meeting held at the offices of Finley, Kumble.

MR. GRUTMAN: What is the letter designation, please?

THE WITNESS: 82-J, marked during my deposition.

Q What happened at that meeting? Who was there, let's start that way.

A I was called in the morning by Mr. Persky to attend a meeting at his firm that afternoon. I went to a meeting expecting that it would be something along the lines that I had previously attended, on the 17th and on the 10th. I got there about 2:00 o'clock in the afternoon and I found that I did not leave until 3:00 o'clock in the morning, and when I left at 3:00 a.m. the meeting was still going on and I understand it broke up somewhere around 7:00 o'clock in the morning.

Q Who was present?

A At that meeting were present several people, Mr. Persky, his associate, Mr. Bamberger, in and out during the meeting, Mr. Robert Stern, Robert Newburger, Andrew Newburger, I think, Ambrose Doskow, who was a partner of Max Freund, Arthur Richenthal, Dan Eisenberg, a lawyer by the name of Daniel Shapiro, Mr. Berkowitz --

Q Which Mr. Berkowitz?

A Mr. Larry Berkowitz, Mr. Muh, Mr. Bialkin, Mr. Charles Lewis -- I am trying to picture the table -- and I think there were others.

Q What was the subject of that meeting?

A The subject of that meeting was to negotiate from a set of working documents -- there were documents actually prepared of an agreement of sale of the assets of the partnership to a new corporation -- to negotiate the terms of those agreements. When I came into the room a draft agreement was already there and it was to be a negotiating session that was intended to end with signatures, and these negotiations went on in the afternoon and into the evening and into the morning and there came a point when I just wasn't going to stay any longer and left. But others did stay, and an agreement the next day was sent around for signatures, a preliminary agreement perhaps is not a good word, but it was a signed document and it was intended with certain amendments, changes, schedules, and all, to ultimately become a formal agreement.

Q Did that agreement provide what different people would get?

MR. GRUTMAN: Objection. The document speaks for itself.

MR. SHAW: I don't think the document has been introduced in evidence yet, your Honor.

THE COURT: I will sustain the objection. Go ahead.

MR. MANDEL: I shouldn't have used the word "agreement."

Q Were the negotiations about the question of what different people would get in connection with the new corporation and what they would give up?

A Yes.

Q Will you explain -- your clients were Bleich and Donoghue?

A Yes.

Q Were they asked to give up something?

MR. GRUTMAN: I object on the grounds that all these negotiations are merged in the document and it is the document which should be produced.

THE COURT: We are not trying to establish the contents of the document, we are trying to establish what happened in a meeting.

MR. GRUTMAN: He is asking what they were asked to give up and --

MR. MANDEL: I am asking about the negotiations.

MR. GRUTMAN: If the negotiations are in conflict with the written instrument, I don't think they are admissible.

THE COURT: We are not trying to establish the instrument but what was said. The objection is overruled.

Did anybody speak to Bleich and Donoghue or anybody in their behalf as to what was to be given up?

THE WITNESS: The limited partners as a group, of whom Bleich and Donoghue were two, were asked to give up their interest in the partnership, their right to be paid from partnership assets, their right to be paid their capital contribution --

MR. GRUTMAN: Objection. This is outrageous. The document describes what it was and this characterization-

THE COURT: We are not dealing with the best evidence rule, we are dealing with a meeting.

MR. GRUTMAN: We have a lawyer painting with broad brush --

THE COURT: I don't want any comments about broad brushes, and I thought that was clear. Please take your seats, I have ruled and I am permitting this conversation. The only question I have is, Mr. Silverman, if you will please tell us who asked that these be given up. I am going to permit the conversation. I have three times ruled we are not dealing with a document but with a conversation.

The objection is overruled.

A The firm which had prepared the working draft that we were to work from as we walked into the meeting, they were prepared at the Finley, Kumble firm. Finley, Kumble was representing at that meeting the promotors of the new corporation and the limited partners were being asked by Mr. Persky and Mr. Risher and Mr. Muh, who were both there -- I said before I didn't recall if Mr. Risher was there but I have since refreshed my recollection by a document I looked at and Mr. Risher was there -- the limited partners were being asked to give up their interest in the partnership, their right to be paid from partnership assets and from the personal assets of the general partners and they were being asked to accept a convertible debenture in a new corporation.

A debenture is really an instrument that represents a loan. They were being asked to become creditors of the new corporation below general creditors, below the rights of Mr. Aixala to be repaid his capital stock, below the rights of the subordinated lenders of Newburger, Loeb, the partnership, and they were asked to accept this inferior or this low credit status and were told that these convertible notes at some point could be converted into some stock in the new corporation.

So they were being asked to substitute their rights to against assets and to against the general partners and to accept paper, debentures in a new corporation where they did not have these rights.

MR. SHAW: I move to strike on behalf of Risher, your Honor.

THE COURT: Denied.

Q Was there discussion as to what would happen with the general partners?

A Yes.

Q What was that discussion?

THE COURT: Who spoke, please?

THE WITNESS: May I just take a moment, your Honor?

THE COURT: You may.

(Pause.)

A The negotiations here were between Ambrose Doskow, and he was the partner of Max Freund representing the general partners, on the one hand, and there were two people speaking on behalf of the promotors, Mr. Muh and Mr. Persky. There were negotiations back and forth between the two sides as to how much of the tax refunds of the general partners were to be assigned to the new corporation and how much of the indebtedness of the general partners to the partnership, those who were indebted and who had debts to the partnership, how much of those debts would be released, and there were negotiations going back and forth with different figures emerging for different partners.

Also participating in those negotiations -- while Ambrose did most of the negotiating for the partners, Bob Stern himself was there and I think he spoke once or twice, but just minimally.

Q Was anything said about the subordinated lenders?

A Yes. The subordinated lenders --

Q Who spoke, if you remember?

A Representing the subordinated lenders and speaking on their behalf was Kenneth Bialkin, who technically represented, I think, only two, Dworkin and Lobell, but he was speaking for whomever else was in that position, and speaking on behalf of the promotors, Mr. Muh, for sure, and I have a recollection that Mr. Persky also spoke, but I am not sure.

Q What was the substance of those discussions?

MR. SHAW: Objection on behalf of Aixala, your Honor.

MR. GRUTMAN: Objection on behalf of Persky, if he is not sure.

MR. MANDEL: Persky was at least present, he was the attorney for Muh. What was said, if it constitutes anything which could be wrong, and was not disavowed by him is certainly binding on him.

THE COURT: What about Aixala?

MR. MANDEL: He was represented by Persky.

THE COURT: All right, then, the objection is overruled. Is that the state of the record, Mr. Shaw?

MR. SHAW: Aixala was eventually represented by Persky and I believe there is testimony to that effect. I believe Mr. Persky so testified, your Honor.

THE COURT: Go ahead.

A The subordinated lenders were asked to assign their subordinated accounts to the new corporation for a period, I think, of a year, but I am just not certain, and the subordinated lenders, through Mr. Bialkin, wanted a piece of the equity of the new corporation for this assignment and there were negotiations as to how much of the equity they were to receive -- by equity I mean common stock of the new corporation and whether if the new corporation ever went public these subordinated lenders would have registration rights so that the stock could become registered and could be publicly sold. I don't know in terms of numbers of shares, and all, where this came out, although those negotiations continued beyond the 30th and there were subsequent amendments to the agreements as it concerned the subordinated lenders.

Q Do you remember whether Mr. Bialkin walked out of this meeting while you were there?

A Well, he threatened to, and he got up to walk out, I think when negotiations began to reach an impasse, but I don't think he walked out.

Q Was there any discussion or provision regarding Charles Gross on that night?

A No. Charles Gross was not represented at that meeting.

Q Was Gross at the meeting personally?

A No.

Q Was there any discussion about what he would get or be offered?

A There was no discussion. There was, however, a provision in the draft agreement on that subject.

Q What did that --

MR. GRUTMAN: Now could we have the agreement, your Honor?

MR. SHAW: I move to strike unless that agreement is produced.

MR. GRUTMAN: It asks for what the agreement provided.

THE COURT: You say there was a provision put in a draft agreement?

MR. GRUTMAN: That is what he says.

THE COURT: Mr. Mandel, is the provision relevant to your inquiry or not? If not, I will leave it for cross examination as to what its terms were.

MR. MANDEL: All right, I will let it go.

THE COURT: All right, the objection is overruled.

You may cross examine as to what the provision was which was made in that draft on cross examination.

Q I think you said the meeting was still in effect when your ability to go without sleep had been exceeded and you left? Is that about right?

A I am not sure that was the reason for my leaving, but I did leave at 3:00 in the morning.

Q What happened after that?

A The next day what was represented as having been hammered out by 7:30 in the morning was distributed around -- that would be December 31st -- and everyone was asked to sign up.

Q Was it a complete document?

MR. SHAW: Objection.

THE COURT: Yes, sustained. Why don't you mark it, Mr. Mandel, and let's have the witness identify it and show it to the other side.

MR. MANDEL: All right.

A This is not the same thing that had been handed to us when we walked in, this is what emerged after these negotiations. I have it here.

MR. GRUTMAN: Do you have an extra copy?

A This was one of the documents at the bottom of the folder Exhibit 34 marked during my deposition on April 12, 1974.

MR. MANDEL: That is NN. I take it there is no objection.

MR. SHAW: Could we look at it?

MR. GRUTMAN: Could we have it Xeroxed, Mr. Mandel, because we don't have a copy?

THE COURT: You offer it in evidence?

MR. MANDEL: Yes.

MR. GRUTMAN: I have never seen it, Judge.

THE COURT: All right, you may look at it now.

MR. GRUTMAN: It is 30 some odd pages.

MR. MANDEL: It can wait.

MR. SHAW: I notice there are no signatures on this. Wasn't this signed by Bleich and Donoghue?

THE COURT: The offer has been made and you may look at it over the weekend and let me know what your position is.

MR. GRUTMAN: I will agree to the document providin I can get the one Mabel Bleich signed.

THE COURT: That agreement is unacceptable to the Court. There is an offer and you can take a position with regard to it and I will rule on it.

Mr. Silverman, this was what was handed around the next day purporting to be something signed the night before?

THE WITNESS: Yes. It was delivered by messenger and it was dated 7:35 a.m.

THE COURT: That offer is made and you have over the weekend to consider it.

MR. GRUTMAN: May we have the custody of it over the weekend?

MR. MANDEL: We will work it out. We will try to Xerox it here, your Honor.

Q We already have in evidence, do we not, Mr. Silverman, the fact that on December 31st you submitted notices of withdrawal on behalf of Jeanne and Mabel, is that correct?

A Yes.

Q What happened next?

A On December 31st I was informed that Mabel Bleich signed this instrument at Newburger, Loeb at 1:50 in the afternoon. On behalf of Jeanne Donoghue --

THE COURT: 1:50 in the afternoon of --

A December 31st. She signed at the premises of Newburger, Loeb, where she was employed. As to Jeanne Donoghue, the only person who had the power to sign in her behalf in this country was Charles Gross. He had a power of attorney from her. Our firm considered that Charles Gross' legal interests and Jeanne Donoghue's interests might well be different and that therefore it was incumbent upon us to communicate directly with Jeanne Donoghue in Australia and, accordingly, we prepared a letter which we signed on behalf of Jeanne Donoghue which was accepted in lieu of her signature on the agreement and it did not represent her signature, however, and our firm signed on her behalf that letter.

Q When you say "agreement" --

A That document passed around. It was not an agreement at that point. It was in the form of an agreement, but there were a large number of things to be worked out before it could become an agreement and in fact there were changes over the next 40 or so days and a large number of further documents drafted and revised and negotiated and various schedules to this document had to be prepared. It was, I suppose, in the form of a preliminary document that evidenced an intention to sell the assets of Newburger, Loeb.

Q I direct your attention to January 14th of 1971 and ask whether you sent a letter to Mr. Berkowitz?

A Yes, I did.

Q Will you produce that, please?

A 29-CC at my deposition.

MR. MANDEL: That is OO for identification.

THE COURT: Are you offering that in evidence?

MR. MANDEL: Yes.

MR. SHAW: I think it might be in evidence already, your Honor.

THE COURT: Do you have any objection to it as it stands?

(Pause.)

MR. GRUTMAN: Your Honor, I will object to this document on the grounds that at the time he wrote it he was no longer the lawyer for Newburger, Loeb and it contains a great deal of self-serving statements, particularly on the second page.

THE COURT: May I see it, please?

MR. MANDEL: He was writing it on behalf of his clients Donoghue and Bleich. The important part, your Honor, begins here (indicating) and goes to the end.

(Handing.)

(Pause.)

MR. MANDEL: Mr. Rothman says it is already in as Exhibit 100. Maybe we can verify that and avoid an argument about whether it is admissible.

MR. SHAW: Your Honor, I in behalf of Newburger, Loeb offered this in evidence already as Exhibit 100, just as I thought.

THE COURT: Then OO is withdrawn, I take it?

MR. MANDEL: All right.

Q What was the background to your letter of January 14th of 1971 to Mr. Berkowitz, with particular reference to the last paragraph on the first page to the end of the letter?

A On January 13th I received from the Finley, Kumble firm under cover of letter dated January 11th various documents, including what were supposed to be schedules that would be attached to the document that had been signed on December 31st. Two of those schedules were Schedules A-2 and Schedule C. Schedule A-2 was to be a schedule of certain liabilities, or perhaps all of the liabilities -- I would have to read the document to be sure -- that were to be assumed by this new corporation --

Q What does that mean, assumed by the new corporation

A The new corporation was to acquire the assets of the partnership, it was a sale. The partnership was selling assets to the new corporation. The partnership also had liabilities, claims, lawsuits against the partnershi that it would have in the normal course of business, lease obligations, various liabilities, and certain of them were to be assumed by the new corporation, they would become obligors, become obligated to pay on those obligations, and I was surprised to find that various obligations or potential obligations dealing with then pending litigations, many of which I was aware of, having previously represented Newburger, Loeb, were not included in the schedule of liabilities to be assumed by the corporation.

I also knew and found that the claim of Charles Gross to his partnership capital was nowhere assumed by the new corporation and I was very concerned on behalf of my clients, Bleich and Donoghue, that this transaction not go through unless these liabilities, all of which aggregated around $800,000, including the gross $230,000 obligation, as shown on the records of Newburger, Loeb -- unless these were assumed.

So I wrote a letter to Larry Berkowitz, and this is the letter.

Q To whom did you send copies?

A To the three lawyers who had been retained by the limited partners to work out a reorganization and sale deal, that was Eisenberg, Richenthal and Steefel, to Robert Newburger on behalf of the partnership itself, to Robert Persky, on behalf of the promotors and draftsmen of these papers, to my clients, and to William Dilger at the New York Stock Exchange.

Q Would you please read to the jury the contents of that letter you wrote, beginning with the last paragraph beginning on page 1?

A Going how far?

Q To the end of the letter.

A "I was surprised to note that the potential liabilities which may arise in connection with the claims and litigations listed in Schedule C are not referred to in Schedule A-2. It was my understanding that Schedule A-would incorporate by reference the claims listed on Schedule C. It would appear that since the transfer corporation is taking over a going business, Schedule A-2 must include all liabilities which may possibly eventuate from these known litigations and claims. The agreement should be amended to so provide. Similarly, Schedule A-2 must include any other known claims which have been asserted against the partnership. As you know, for example, Mr. Gross has asserted a claim against Newburger, Loeb for his so-called additional capital which was represented by Newburger, Loeb to the New York Stock Exchange to be at least $231,000 estimated. I have not heard directly from Jeanne Donoghue. However, she has not yet approved the proposed transfer and has the right to reject the proposal for any reason.

"In view of what the schedules disclose, I would find it difficult to recommend to her that she consent to the transfer and reorganization if the partnership is going to find itself saddled with numerous unassumed claims totalling at least $800,000, if not a great deal more, with the very substantial cost of defending these claims and with the possibility that the creditors may ultimately be able to execute on the subordinated notes held by the limited partners or any proceeds derived therefrom.

"Moreover, in view of certain provisions of the debtor and creditor law and under certain conditions, the creditors might even be able to reach the separate assets of the consenting limited partners. Similarly, at the time Mabel Bleich signed the draft agreement on December 31st her acceptance, like the acceptances of the other limited partners, was conditioned upon approval of the schedules. I have this morning spoken to Mabel Bleich and have advised her of what the schedules show. It is her position that unless a favorable resolution of the above problem is attained, she will be forced to reject the proposed transfer.

"May I please hear from you as soon as possible in respect of the foregoing."

THE COURT: Is this as good a time as any to suspend?

MR. MANDEL: Yes, your Honor.

THE COURT: Ladies and gentlemen, 10:30 on Monday.

Have a good Fourth of July weekend.

(Adjourned.)

we will put Mr. Brout on.

(Jury present.)

ARTHUR SILVERMAN, resumed.

DIRECT EXAMINATION (Continued)

BY RM. MANDEL:

Q Mr. Silverman, are you ready?

A Yes.

Q I hope I am, too.

If my memory is right, before the 4th of July we left off at a point where you had certain telephone conversations with Mr. Berkowitz and Mr. Muh who agreed to revise and supply schedules as requested.

Am I right about that? Is that in accord with your recollection of where we left off?

A That's correct.

Q Now--

A I'm not sure that we reached the point of the telephone conversations. I had sent a letter setting forth certain complaints that I found. That was a letter of January 14th addressed to Mr. Berkowitz. I don't know that we had reached the point of phone dalls yet.

Q That's Exhibit OO for identification and you read certain paragraphs of it to the jury; is that correct?

A That is correct.

Q Now, what happened, if anything as a result of that letter youwrote to Mr. Berkowitz, referring to the various schedules attached to the preliminary agreement?

A I had conversations with Mr. Berkowitz and with Mr. Muh on January 14th, which was I think the date after that letter was sent, or the same day that letter was sent.

Q Same day?

A And as a result of these conversations it was agreed by Mr. Berkowitz and Mr. Muh that the schedules would be amended to include the assumption of the various liabilities that had not -- as to which provision had not previously been made. And I confirmed that by letter the next day to Mr. Persky.

Q And do youhave a copy of that letter to Mr. Persky?

A Yes, I do. It is a letter dated January 15, 1971, delivered by hand to Mr. Persky and marked at my deposition as 29AA.

Q 29AA?

A Yes.

Q I will have to rely on your copy, Mr. Silverman, I am afraid.

A This is the file copy of that letter (handing).

(Defendants' Exhibit PP was marked for identification.)

MR. MANDEL: I offer it in evidence.

MR. SHAW: No objection, your Honor.

THE COURT: Very good. Received.

(Defendants' Exhibit PP was received in evidence.)

Q Would you please read PP to the jury, Mr. Silverman.

(Witness reads Defendants' Exhibit PP in evidence to the jury.)

Q Did you also have any conversations on January 14th before sending out PP in evidence on January 15th? PP is the last letter you have read, dated January 15th.

A Conversations on the 15th?

Q On the 14th.

A On the 14th. I had a conversation prior to sending that letter with Mr. Dilger of the New York Stock Exhcnage but it was not in relation to the subject of the letter.

MR. GRUTMAN: Your Honor, I observe that the witness is referring to a certain document to refresh his recollection. Could that document be marked for identification, please?

THE COURT: These are notes that I understand have already been marked.

MR. GRUTMAN: They are not, your Honor.

THE WITNESS: May I explain what these are?

THE COURT: Why don't we just mark them at this point. At some point it may be appropriate for you to do that, Mr. Witness.

(Defendants' Exhibit QQ was marked for identification.)

MR. GRUTMAN: Thank you.

Q Mr. Silverman, would you please tell the jury what the papers that have just been marked QQ for information are.

A Yes. In connection with this series of events that took place from December 10th through February 11th, I came to accumulate quite a few papers, draft agreements and various notes at meetings, correspondence and a large number of time sheets. And in order to keep the events of particular days on track during my testimony I prepared a summary of the various events that happened by date so that I could focus my attention and testify accurately as to what happened on different dates.

A lot happenedon each and every particular day as reflected by the materials in my files.

Q And about when did you prepare QQ?

A I would say some time in the past three weeks to four weeks.

Q Now, going back to the 14th of January 1971 you say you had certain telephone conversations relating to this matter. Will you please state with whom you had the conversations and the substance of the conversations?

A I had a telephone conversation with Mr. Dilger who was the person in the Department of Member Firms, I think it was, of the New York Stock Exchange, who was the Exchange representative, I suppose is the word, in respect to the Newburger, Loeb events.

Mr. Dilger asked me to keep the discussion off the record. There were several matters -- I asked Mr. Dilger what were his views as to whether the reorganization would go through and what problems did he foresee with it,a nd he gave me his response.

Q What did he say?

MR. GRUTMAN: Objection.

THE COURT: This is a gentleman from the New York Stock Exchange?

THE WITNESS: Yes.

THE COURT: Sustained.

MR. MANDEL: I am sorry, your Honor?

THE COURT: Sustained.

Q With whom else did you have a discussion?

A Prior to the send of the letter I had, on the 14th I had no discussions. I am sorry, prior to my discussions with Mr. Berkowitz and Muh on the 14th I had no discussions. I did have a discussion later in the day of the 14th in respect to matters not having to do with the schedules of the agreement.

Q With whom was that conversation?

A I received a telephone call from Charles Gross.

Q And what was that telephone call about?

A He called to tell me that he had received word from Jeanne Donoghue. She called him, that she was not going to consent to the sale and transfer of the assets from partnership to the corporation.

Q Did you have a conversation with Mr. Persky on that day?

A Yes, I did. I called Mr. Persky.

Q Yes.

A I told Mr. Persky what I had been advised by Mr. Gross. I told him, Mr. Persky, that I was going to be calling Mrs. Donoghue, my client, myself that evening in Australia to find out what her views were and to confirm whether or not she was going to go along with this transaction and to find out, if not, why not.

Q What did Mr. Persky say, if anything?

A Mr. Persky responded that he would be willing at some point, and I took down notes of the conversation and I put quotation marks, "He would be willing to stand and argue with Charles as to what's owed him."

He further stated "It would not serve Charles' interest if the deal were blown, several people would be looking for his head."

Q Whose head?

A Charles Gross.

Q Who said that?

A Mr. Persky.

MR. SHAW: Objection. It is obvious it was Mr. Persky who said that.

Q You said you made a note of that conversation?

A I made notes of my conversations that occurred during the entire day on one sheet of paper.

Q I ask you to produce that.

A These are notes marked as 28-K at my deposition.

(Defendants' Exhibit RR was marked for identification.)

MR.MANDEL: I offer in evidence at least so much that refers to the conversation with Persky on the back page. I am willing to put in the whole thing if my friends like.

(Pause.)

MR. GRUTMAN: Your Honor, I object to Mr. Mandel's offer at this point to put the whole of that document in.

I further object to that portion of the document relating to what he said as a quotation. Since there is a quotation standing in part of the quote but the quotation mark at the other end of the quote is not there.

I further object on the ground this is not probative of anything other than what the witness has already testified to. It is cumulative, repetitive and self-serving.

THE COURT: Let me see the exhibit.

MR. GRUTMAN: Here it is.

(Handing.)

MR.GRUTMAN: It has not yet been described as a record regularly kept in the course of the business.

THE COURT: That rule does not apply here.

MR. MANDEL: The part that I am offering --

MR. GRUTMAN: Is what appears below your home phone number?

MR. MANDEL: Mr. Grutman, I thought you said we would have colloquy between counsel.

(Pause.)

THE COURT: Mr. Silverman, do you today, as you sit on this witness stand, have a present recollection of this conversation, or is your recollection based upon these notes?

THE WITNESS: I haveno present recollection of the conversation.

THE COURT: You do not?

THE WITNESS: I do not.

THE COURT: And these notes, Exhibit RR for identification, were those made as of the time of this phone call with Mr. Persky?

THE WITNESS: Yes, they were.

THE COURT: Can you say today that they reflect the conversation as best you recall it at this time?

THE WINTESS: They reflect what Mr. Persky said to me.

THE COURT: That you took down at the time?

THE WITNESS: Yes.

THE COURT: You recall this to be an accurate transcription of what you took down at the time?

THE WITNESS: Yes.

THE COURT: I will admit it in evidence, everything after Mr. Mandel's phone number.

(Defendants' Exhibit RR was received in evidence.)

Q Beside the letter of January 15th to Mr. Persky, which is already in evidence, did you send another letter to Mr. Persky on January 15th, 1971?

A Yes, I did. The night of the 14th I called Mrs. Donoghue in Australia. I spoke to her and as a result of that conversation I sent a letter to Mr. Persky the next day.

Q Will you produce that?

A Yes. It is a letter of January 15th, addressed to Mr. Persky, delivered by hand and marked as 29-Z at my deposition.

(Defendants' Exhibit SS was marked for identification.)

MR. MANDEL: I offer it in evidence.

MR. GLATZER: No objection.

MR. GRUTMAN: No objection.

MR. SHAW: No objection.

THE COURT Received.

(Defendants' Exhibit SS was received in

evidence.)

Q Will you please read SS to the jury, please, Mr. Silverman.

(Witness reads Defendants' Exhibit SS in evidence to the jury.)

Q Now, did you have a conversation with Mr. Persky after you sent out that letter of January 15th?

A The next record that I have of a conversation with Mr. Persky was on January 19th.

Q And in what form does that record take place?

A That record is in the form of a letter of January 20th confirming a portion of the conversation.

Q Will you produce that letter, please.

A Yes. It is a by hand letter of January 20th, 1971 marked 29W at my examination.

MR.MANDEL: Mr. Rothman says he believes that is already in as 102. Can you verify that?

MR. SHAW: I can't answer that.

You mean a document that I offered?

MR. MANDEL: Yes.

(Pause.)

Q Is Exhibit 102 in evidence the letter you refer to?

A Yes, it is.

Q All right. Will you please read this exhibit to the jury.

(Witness reads Plaintiffs' Exhibit 102 in evidence to the jury.)

Q Now, what is the next thing that happened, Mr. Silverman, in connection with the negotiations regarding the transfer agreement?

A The next thing that happened I am informed was a meeting which occurred at the Stroock law firm the same day that I sent that letter. I did not attend that meeting.

Q What was the date of that meeting?

A January 20, 1971.

Q Did you send a representative to that meeting?

A There were two representatives of my office who went to that meeting.

Q Whom you sent down?

A Who we setn down by the firm. I was an associate at the time. I am not just sure I had the prerogative to send people without a partner's approval or a partner's direction.

Q And who went to that meeting?

A Robert Birnbaum, a member of the firm, and

Edward Tanenhouse, an associate of the firm.

Q And did you get a written report from anybody with regard to that meeting?

A I received notes that were taken by Mr. Tanenhouse at the meeting.

Q Were those reports preserved by you and by your firm as a document kept in the regular course of business?

A Yes, they were.

Q Will you produce that?

A These have been marked as 28-K-2 at my deposition.

MR. MANDEL: Defendants' TT for identification.

(Defendants' Exhibit TT was marked for identification.)

MR. MANDEL: I offer it in evidence.

THE WITNESS: I also received a sign-up sheet of the people attending that meeting, Mr. Mandel.

(Pause.)

MR. GRUTMAN: I have no objection, your Honor.

MR. SHAW: No objection.

THE COURT: Received.

(Defendants' Exhibit TT was received in evidence.)

Q Now, did you say that you also received an attendance sheet with relationship to the meeting of January 20th?

A Yes, I did.

Q Will you produce that, and may we attach that, just as part of TT? Does anybody object?

MR. GRUTMAN: I haven't seen what he called the sign-up sheet. We don't have that.

MR. MANDEL: Here you are (handing).

MR. GRUTMAN: Your Honor, I object to the receipt of the document because the earlier document which has just been received as TT reflects the attendance of Mr. Mandel and he is not on the sign-up sheet.

MR. SHAW: He didn't sign his name.

MR. MANDEL: That means that everybody didn't sign the sheet.

MR. GRUTMAN: It is an incomplete document.

MR. SHAW: I object, your Honor, because it is incomplete. It gives the wrong impression.

MR. MANDEL: The fact that everybody was there and did not sign doesn't mean the document is inadmissible to prove those who did sign were there.

As your Honor probably knows, these things are passed around and some people signed and some people did not.

THE COURT: Objection is overruled.

MR. MANDEL: May it be marked as part of TT?

THE COURT: I think you had better make it a separate letter.

(Plaintiffs' Exhibit UU was received in evidence.)

Q What is the next thing that happened in connection with these negotiations, Mr. Silverman?

A The next day there were a series of events. I had a meeting with Mr. Dilger at the New York Stock Exchange in the morning. I received some correspondence -- I don't know that I reeived them the next day. There was correspondence dated the next day. I might have received it on the 22nd. I had a telephone conversation with Mr. Persky on the 21st.

Q What was the subject of that telephone conversation?

A The subject of the conversation was a response to a letter that Mr. Perseky had sent me on the 21st. I apparently received it on the 22nd, as well as confirming some advice that Mr. Persky had given me on the 21st.

Q And did you send Mr. Persky a confirming letter with regard to your telephone conversation?

A It was confirmatory of a portion of that conversation and was in response to a letter from him dates January 21st.

Q Will you produce his letter dated January 21st?

A Yes. That's a letter marked 29-U for identification at my deposition.

MR. MANDEL: That may already be in evidence. I don't know.

(Defendants' Exhibit VV was marked for identification.)

MR. MANDEL: Any objection?

MR. SHAW: Your Honor, could I suggest something? Mr. Mandel, as I understand it, should have shown us all these documents before. If we had met or seen them before this morning, we could be saving tremendous amounts of time, as I have done with marking 50 or 60 documents and showing him prior .

THE COURT: Haven't you copies of these?

MR. SHAW:Yes. But we have no idea what is coming next.

THE COURT: When we come to the recess, do that.

MR. SHAW: I am wasting the jury's time while

I am sitting here and reading documents. It is wrong.

THE COURT: To the extent counsel can tell each other and premark them, that will save time.

MR. SHAW: There is no doubt regarding the authenticity of this document.

THE COURT: It may be received.

(Defendants' Exhibit VV was received in evidence.)

Q Willyou please read it to the jury, Mr. Silverman.

THE COURT: Mr. Mandel, while he is reading, come up to the bench.

(Witness reads Defendants' Exhibit VV in evidence to the jury.)

THE WITNESS: It is interesting, because the corporation was not in existence.

MR. SHAW: Objection, your Honor and move to strike.

THE COURT: Yes, strike that.

IN any event, the letter is signed Newburger, Loeb & Co., Inc.?

THE WITNESS: The law firm by Robert S. Persky but the handwritten signature is Bob Persky.

MR. SHAW: What is the dateof the letter?

THE COURT: January 21st.

MR. GRUTMAN: I think Mr. Silverman is in error. December 30th is the date the corporation wa legally recognized by the State of Delaware.

MR. SHAW: Move to strike and ask the jury to disregard that. The testimony of Mr. Persky, which is evidence in this case, is that the corporation was formed, I believe, in the month of December 1970.

THE COURT: Yes, all he is pointing out is the copy is to Mr. Risher of Newburger, Loeb & Co., Inc. Anything else is stricken with regard to that.

Q What is the next thing that happened, Mr. Silverman?

A Well, a variety of things happened on the 22nd. I will try to put them into some order. One thing that happened was I answered this letter that I just read, and the letter that I wrote in response to the letter of the 21st was both in answer to the letter and confirmatory of a prior conversation I had had with Mr. Persky on the 21st and was also addressed to the subject of Mabel Bleich signing an agreement extending the date of withdrawal of her capital.

That was an agreement that had been requested at the Stroock firm on -- at the meeting of the 20th.

Q To whom did you write the letter?

A That was a letter written to Mr. Persky.

Q Will you produce that, please?

A Yes, it was 29-A at my deposition. It is in two pages but they have come apart.

(Defendants' Exhibit WW was marked for identification.)

MR. GRUTMAN: Your Honor, Mr. Mandel has just advised us he has about 16 documents he wants to put in evidence, and I asked him whether he plans to have the witness read them.

MR. MANDEL: I am not going to read them all but some of them.

MR. GRUTMAN: Why don't you put them in.

MR. MANDEL: Please let me do my own thing, try my case in my own way.

No objection?

MR. SHAW: Let me look at it now.

(Pause.)

MR. GRUTMAN: No objection, your Honor.

MR. SHAW: I am still reading it, your Honor.

(Pause.)

MR. SHAW: I object to this on behalf of defendant Aixala, your Honor, who does not appear to have

If the connection is not forthcoming I can instruct you as to which ones they binding on, which ones you may consider it against and which you may not. We are going to put off that day until Mr. Mandel's proof is closed with regard to certain of these exhibits.

Go ahead, sir.

BY MR. MANDEL:

Q Mr. Silverman, I direct your attention to the 28th day of January, 1971 and ask whether you attended a meeting on that day.

A Yes, I did. And I attended a meeting at the Finley, Kumble law firm on that day. The meeting started about mid morning, 10 or 11 o'clock.

Q Who was present at that meeting?

A Mr. Persky was there, Mr. Steefel, Mr. Lewis, Mr. Shapiro.

Q Who is Mr. Louis?

A Charles Louis was an associate of Kenneth Bialkin from the Wilkie, Farr law firm, Kenneth Bialkin was a partner of that firm and they represented Mr. Lobell and Mr. Dworkin, two subordinated lenders.

Q Who is Mr. Shapiro?

A I don't recall who Dan Shapiro represented. I know Dan personally. I don't recall who he represented.

Q Who else was present?

A Mr. Risher was there, Mr. Richenthal was there.

Q You mean Paul Risher, a defendant here?

A Yes. Mr. Larry Berkowitz was there. Mr. Burak was there from the Rosenman law firm. That's the same firm Max Freund was from and the same firm as Ambrose Doskow who attended the meeting on September 30th.

Q Who did Mr. Burak represent, ifyou know?

A He represented Robert Newburger and Andy Newburger and the partnership itself in connection with this transaction.

Q And who did Mr. Persky represent?

A Mr. Persky represented the transferee corporation and the promoters of that corporation.

. Q Who were the promoters with Risher and Muh, Kayne, Sloane, Berkowitz. Mr. Persky also represented the partnership itself on day-to-day matters and on litigations.

MR. GLATZER: Your Honor, I move to strike as to Mr. Persky's representation. I don't think this witness is competent to testify as to who Mr. Persky represented.

MR. SHAW: I understand the witness is merely testifying as to what his past recollection recorded on his notes indicate and he has no independent recollection of these things.

THE WITNESS: That's not true. As a matter of fact these notes don't indicate that at all. I have a very independent and clear recollection as to who Mr. Persky was representing.

THE COURT: I will permit it and allow you to cross examine. If it turns out he doesn't I will strike it.

MR. SHAW: In advance,your Honor, I would like to object to any of this testimony with respect to Mr. Aixala, who has not been mentioned as a person among the persons who Mr. Persky was allegededly representing.

THE WITNESS: I did not know who was representing Mr. Aixala.

MR. MANDEL: He didn't mention Aixala. We will bring that proof later.

THE COURT: Go ahead.

THE WITNESS: There may have been others at the meeting. I don't have a recollection. I have a recollection. of there being more people than the people I named. I don't recall who they were.

Q Was anything said at this meeting about Jeanne Donoghue?

A Yes. Several things were said. Mr. Persky said that it would require the consent of all to bypass Jeanne Donoghue, that she would be paid the --

MR. GRUTMAN: I see the witness' eyes darting down to a piece of paper. If he professes to have a selective recollection without the paper, then I think he should testify without it. If he is testifying on the basis ofhis past recollection recorded, then I think we ought to have the document and not an interweaving of the document and something that he thinks hemay recall.

One or the other.

THE COURT: That's fair enough.

THE WITNESS: Your Honor, there is a difficulty, because in some instances a document represents past recollection recorded. In other cases -- when you have a series of notes certain entries causes one to have a present recollection refreshed. There are a whole series of entries and documents. It is very hard to say that a particular document -- once in awhile you can say it -- but a particular document is either past recollection recorded or is used to refresh a present recollection.

MR. SHAW: Can we have the witness first testify according to his unaided recollection and then after he has exhausted that recollection, refresh his recollection by looking at notes.

MR. MANDEL: I believe the witness may use whatever he likes to refresh his recollection. It then becomes a matter for cross examination..

THE COURT: I think in the first instance we ought to esablish whathis present recollection is. If there is none, obviously then we will get down to whatever aids him in coming up with what occurred.

MR. MANDEL: All right.

Q Mr. Silverman, without reference to any notes, just your independent recollection, what anything said at this meeting about Jeanne Donoghue?

A Yes.

Q What was said?

A Mr. Persky siad that he assumedthat Jeanne Donoghue would be paid. Mr. Steefel said that they can probably do the deal and absorb Jeanne Donoghue and pay her out but they couldn't absorb anybody else.

Mr. Burak said as to Jeanne Donoghue that there would be litigation if she didn't sign up and was not paid.

Q Now, was anything else said about Mabel Bleich that you recall?

A Yes. Mr. Steefel said that the deal could not be done if Mabel Bleich did not go along. They could absorb Jeanne but could not absorb Mabel Bleich.

Charlie Louis said that the deal blew if Mabel Bleich didn't go along.

THE COURT: What is the date of this?

THE WITNESS: A meeting of January 28, 1971.

Q Was anything said by anybody -- before we go further with that would you please --

A I might say there was one other thing about Mabel. When Mr. Burak said there would be litigation unless Jeanne signed, I am fairly certain he mentioned in his statement or referred to both Jeanne and Mabel.

Q Now, would you refresh your recollection by looking --

MR. SHAW: Objection,your Honor. The witness has not indicated that his recollection needs refreshing.

THE COURT: Go ahead.

Q Is there anything else that you can remember that was said about Jeanne Donoghue or Mabel Bleich at this meeting?

A Yes, yes.

Q What else?

A As to Mabel Blecih very definitely. WE were in a large conference room, the large one at Finley, Kumble, and I was asked by Arthur Richenthal just what are

Mabel's intentions. I said I don't know.

He said "Let me speak to you in the other room."

We went into a small room which adjoins the large conference room. I don t know how large that small room is, but it appeared to me to be qu[illegible] small with the furniture and all. And within a very few minutes everyone that had been in the big room came into the little room and they were all around the perimeter in the little room and I found myself standing in the middle. Richenthal said "You have to let us know now where Mabel stands."

He said "We can't go forward without knowing where she stands."

Bob Persky said "This isn't fair to us, Arthur. You have to find out right now, and in fairness to us we think you should go outside and call Mabel Bleich at Newburger, Loeb where she worked and find out right then and there what her intentions are."

Mr. Steefel took the same point of view, and there came a point in that meeting in the small room where --

Q About how many people were around you at this moment, would you say?

A 12.

Q All right. Continue, please.

A There came a point where I was asked to leave that room and go make a phone call and call Mabel Bleich at Newburger, Loeb and find out what her position was.

I said I was not going to force Mabel to make up her mind at that point. She was already under enough pressure from the people at Newburger, Loeb. They said "You owe it to us, go out and call her."

So I did.

I went through the large conference room into a hallway and across to an office which looks out on Madison Avenue. I don't recall which office but it was approximate to the conference room. I placed a call to Mabel Bleich. I spoke to her for perhaps five minutes and went back into the small conference room and said to the gentlemen there assembled, "Mabel has not made up her mind."

Q Was anything else about Mabel Bleich at that meeting --

MR. GRUTMAN: May we have the date of the meeting?

THE COURT: January 28th.

MR. GRUTMAN: Is there a document for this?

MR. MANDEL: 28-Q.

A I don't recall anything further.

Q Would you now refresh your recollection by reference to the document and see if there is anything further that comes to your mind by refreshing your recollection.

A (Reading) Just some discussion about the granting of general releases. My recollection is not further refreshed.

Q Without reference to the document was anything said at that meeting about Charles Gross?

A Yes, there was a discussion about Charles Gross with Mr. Steefel throwing out on the table asking a question as to where Charles Gross would take paper, preferred stock of, I think, around $100,000 and go along with the deal. Nobody really had a response to it, nobody there responded to that question and finally Mr. Steefel said, "Let the deal go through and let him sue for his money."

MR. GRUTMAN: Now, your Honor, if the witness -- All right, withdrawn.

Q Was Mr. Persky present at that time?

A Yes.

Q Was Mr. Risher present at that time?

A Yes.

MR. SHAW: Your Honor, may I note my objection with respect to Defendant Aixala.

THE COURT: Yes.

Q Was Mr. Burak of the Rosenman firm present at that time?

A Yes, he was.

Q Was there anything said by or about -- by Mr. Louis concerning what Mr. Gross or what Mr. Mandel might do?

A I think that Mr. Louis that you on behalf of Gross would sue, that there would be a certain disruption and a suit.

Q Now, have you now exhausted your recollection with regard to anything that was said about Charles Gross at that meeting?

A Yes.

Q Do you remember whether any amount was stated by anybody at that meeting as to Mr. Gross' capital position?

A Yes, I do. There came a point in the meeting after the meeting in the little room, where we went back into the big room for a very short period of time. Apparently -- there were some figures that had been gathered together as to the interests of the various general partners and subordinated lenders in Newburger, Loeb. Paul Risher had a list and read the list off and among the names he read was the name of Charles Gross and the alleged amount of Charles Gross' positive capita interest in the partnership at that time.

Q Do you remember the number which he stated was Charles Gross' positive capital?

MR. SHAW: Objection to leading.

THE COURT: Overruled.

A I have a recollection that itwas somewhere in the order of 610 to $170,000 but I am not sure.

Q Did you write down what was said by Mr. Risher about the capital position of the various partners at that time?

A Yes, I did.

Q All right.

Will you please now look at the document and see if it refreshes your recollection as to what was said about Charles Gross' capital position by Mr. Risher?

A Positive capital position of $162,734.

MR. SHAW: Objection on behalf of Aixala, your Honor.

MR. GRUTMAN: I object. If the contents of that document are going to be offered in evidence the document should go in as BBB.

THE COURT: To the extent that it was used that far I would certainly agree with you.

MR. MANDEL: That it should go in?

THE COURT: Yes.

MR. MANDEL: Let it go in certainly.

THE COURT: Any objection?

MR. SHAW: May I see it?

THE WITNESS: This was 28-Q marked at my examination before trial.

MR. GLATZER: I press the same objection with regard to that document.

THE COURT: Same ruling.

(Defendants' Exhibit BBB was marked for identification.)

MR. SHAW: I make the same objection I made before with respect to Aixala, your Honor.

THE COURT Same ruling. It may be received.

(Defendants' Exhibit BBB was received in evidence.)

Q Now, Mr. Silverman, I call your attention to page 2 of Defendants' BBB and I call your attention to a line right below the line that begins with "Rosenman". The line that says or beginning with the word "Berkowitz". Would you read that line, please to the jury.

THE COURT: Just before we get into this, as to these notes I take it your objection was the connection and not the fact that they represent accurate memoranda he would so testify of the events of that time? Is that correct?

MR. SILFEN: That is correct, your Honor.

THE COURT: All right.

A This is toward the bottom of the page?

THE COURT: Yes.

A "Berkowitz states he's very specific about Gross."

Q Does that refresh your recollection?

A No, it does not.

Q All right. I ask you read the bottom line on the second page.

"MR. PERSKY: -- Jeanne really is an ordinary creditor claim."

Q Does that remind you of anything? Does that refresh your recollection?

A Well, I testified already to the point that Mr. Persky said that Jean Donoghue would have to be paid. It doesn't add further to my recollection.

Q Now, I call your attention to page 4, though it is not numbered, I mean the page where there is a list of names of partners, Mr. Silverman.

A Yes, I have that.

Q With amounts entered oppose their name -- may I show this to the jury?

THE COURT: Yes.

Q I ask whether those names and numbers represent the statements you have testified about that were made by Mr. Risher as to the capital state of the various partners?

A Yes, they do.

Q And the name Gross appears on the next page where the list is extended; is that correct?

A Yes, his last name. Then there is a line that says "Must add: Interest income and interest charges."

I read that because my writing is pretty poor, I guess.

(Pause.)

Q Now, after the meeting of January 28th, did you report to your client, Miss Bleich?

A Yes, I did.

Q And what is the next thing that happened?

A Miss Bleich resigned her employment with the partnership and rejected the plan of reorganization.

Q Was that confirmed by writings?

A Yes, it was.

Q Will you produce those writings, please.

A The rejection of the reorganization plan is a letter dated February 1, 1971, previously marked as 29-L, and the letter terminating employment is 29-M, which is also of the same date, February 1, 1971.

MR. MANDEL: Mark that CCC for identification.

(Defendants' Exhibit CCC was marked for identification.)

MR. MANDEL:Mark this also.

(Defendants' Exhibit DDD was marked for identification.)

MR. SHAW: Object with respect to Mr. Aixala, your Honor, to CCC a so DDD.

MR. GLATZER: The same objection on behalf of Muh, Sloane and Kayne.

MR. GRUTMAN: Defendant Finley, Kumble objects to DDD.

MR. ESTERMAN: Defendant Persky objects to DDD.

THE COURT: Same ruling. It may be admitted subject to connection.

THE COURT: It is admissible against Mr. Persky and his then firm.

Same ruling as to DDD. It is clearly

AFTERNOON SESSION

2:05 p.m.

(In open court; jury present.)

ALAN PAUL BROUT, called as a witness on behalf of the defendant Finley, Kumble, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GRUTMAN:

Q Where did you go to college, please?

A I attended Dartmouth College. Graduated from there.

Q What was the year of your graduation?

A 1951.

Q Were you graduated with any honors?

A I was a member of Phi Beta Kapa at college.

Q And upon your graduation, Phi Beta Kapa, from Dartmouth College, did you take any post graduation education at Dartmouth?

A Yes. I attended the Tuck School of Business and Administration and graduated with an MBA, Masters in Business Administration, with the highest distinction.

Going back, I graduated Magna Cum Lauda from Dartmouth as well.

Q The degree Master of Business Administration with the highest distinction, is that the highest diploma that Dartmouth gives for that degree?

A Yes.

Q After having attained your second degree from your alma mater, did you continue your professional education elsewhere?

A I attended Columbia Law School, graduating there in 1955.

Q Upon your graduation from Columbia Law School, what career did you pursue?

A I was an associate with a law firm for a year. I passed the bar examination, then went into the practice of public accounting with the firm of Henry Brout & Company, organized by my father. I have been there ever since. The firm is now Brout & Company.

Q And is your father still active in the practice?

A He is.

Q While you were at Dartmouth did you take any special training or courses in the accountancy?

A Yes. I took sufficient courses to qualify for the examination of certified public account which I passed after having the three years of practical experience required by the examination.

Q So you are a certified public accountant?

A Correct.

Q And having attended the Columbia University School of Law, although you do not practice law, have you passed the bar examination in New York?

A Yes.

Q Are you a member of the bar in good standing?

A I am.

Q Except for the one year that you spent as an associate in some law firm, has all of your professional life been in the field of accounting?

A Since 1956, yes.

Q What was the name of the law firm with which you spent the one year in associateship?

A I worked forthe firm of Parker, Chapin & Flattau for a year.

Q How large is Brout & Company, Mr. Brout?

A The firm has 14 partner and a total of 115 people, of whom about 70 are professionals.

Q Does the firm --

A Meaning CPAs.

Q Does the firm maintain offices elsewhere as well?

A In Los Angeles as well.

Q Is the work you do --

MR. MANDEL: I will concede this witness' qualifications as an accountant and expert.

MR. GRUTMAN: Thank you very much.

Q Mr. Brout, at the request of my office were you engaged to do anything concerning any certified statements or financial records relating to the Newburger & Loeb Company account?

A Yes, I was asked by your firm to -- engaged by your firm to examine work papers made available to me by the public accounting firm of Peat, Markwick & Mitchell Company, related to the year ending December 31, 1970, which led to the preparation of a statement of financial condition and partners capital account.

Q I show you the document which is in my hand and ask you whether you recognize that to be a statement of financial condition prepared by the public accounting firm of Peat, Marwick & Mitchell relating to Newburger, Loeb & Company as of December 31, 1970?

A That is correct.

MR. GRUTMAN: I offer that document in evidence.

MR. MANDEL: No objection.

MR. SHAW: No.

MR.MANDEL: I am told it is already in.

MR. GRUTMAN: Not to my recollection.

(Defendant Finley Exhibit I was received in evidence.)

Mr. Brout, when I ask you any questions that may fall within your expertise, if you have some kind of shorthand that the accountants use when talking to each other I would ask you to discard that and try and explain terminology to us in a framework which will be more readily intelligible to us as lay people who are not accountants, all right?

A I will do my best.

Q What is that document which you characterize as a financial statement?

A It is a statement of financial condition which shows the assets and liabilities and capital accounts of Newburger, Loeb & Company which was prepared from working papers created by the accounting firm.

Q Now, the accounting firm that you mentioned, Peat, Marwick & Mitchell, is that an accounting firm which is known to you?

A Very much so, yes.

Q Do you have any familiarity with an expression called the Big Eight?

A Yes, I do.

Q What does that expression mean?

MR. MANDEL: I will object. This is irrelevant.

MR. GRUTMAN: It is a national accounting firm is what I am getting to.

MR. MANDEL: Irrelevant. Partnership adopted this statement. The accountants did it. It doesn't make any difference whether it is the Big Eight or Small Eleven.

THE COURT: Sustained.

QIs the Peat, Marwick firm a firm which does accounting work throughout the United States?

A Yes, throughout the world.

Q Do you know how large the firm is?

MR. MANDEL: I object to that as irrelevant.

THE COURT: Overruled.

A It is the largest accounting firm in the world or so I have heard.

Q Mr. Brout, did you see the work papers which were prepared by the members of Peat, Marwick & Mitchell that worked on the Newburger, Loeb & Company account and who prepared that document, Finley, Kumble Exhibit I in evidence?

A No, I didn't. What I reviewed was the microfilm of those work papers rather than the original work papers themselves.

Q What did those work papers consist of generally?

A The microfilm that I reviewed consisted of 12 audit binders which involved descriptions of the assets, liabilities and the steps taken by Peat, Marwick, Mitchell and their staff, really, in ascertaining whether the assets were correctly stated and whether the liabilities were described fully and consisted of all the liabilities owed by the partnership during the audit period, yes.

Q You say audit binder. What is an audit binder?

A Simply a work paper file. They could range anywhere from 2 inches thick to 4, 5 inches thick. It is just a division of the work paper so they would be less unwieldly in using them.

Q Did those audit binders indicate whether personnel from Peat, Marwick had made any verification of the numbers reported to them by their client?

A Yes.

Q Did it show they made such a verification?

A Let me first state that the work papers -- I did not review the entire 12 binders of the work papers. I only reviewed certain portions of those work papers, for two reasons:

1, I did not feel it was particularly relevant to my examination, to my engagement to review all the binders, which would have taken an inordinate amount of time.

The second reason was that some of the microfilm was illegible and could not have been easily read or read without use of sophisticated decoding techniques which were beyond my means.

Q Well, were you able to read and comprehend and assimilate the audit binders which you thought were germane for the limited purpose for which you had been engaged?

A Yes.

Q Among the things which you looked at, did you look at what is called the capital accounts of the general and limited partners as they are reported on the December 31, 1970 statement?

A Yes. My examination of the microfilm included a review of the capital accounts of the partners and the limited and general.

Q I promised the Court that I would be not more than 30 minutes with your examination and I intend to adhere to that. Before we go any further I will ask you please would you tell us what a capital account is? What does that mean, that phrase?

A The assets of the firm from which are subtracted the liabilities of the firm result in the capital of the firm. This capital is divided among the partners of the firm, this resultant figure, based on agreement of the partners. Assets whatever liabilities equals capital. That is what we call the accounting equation.

Q Do the capital accounts of the partners vary, one from the other?

A Yes.

Q Would that variance be in accordance with agreements made by the partners?

MR. MANDEL: I object to that question.

MR. GRUTMAN: Withdrawn.

Q Does a capital account as it is reflected in a financial statement mean that the business entity owes any particular sum of money to any partner?

MR. MANDEL: I object to that question.

A No, it does not.

MR. MANDEL: I object to that question.

THE COURT: Overruled.

Why don't you ask him what it does mean, Mr. Grutman.

Q Tell us what the capital account as stated means?

A That is a share of the equity owned by the partner or assigned to the partner.

Q Does it reflect a debt by the partnership to the partner?

A No, it does not.

MR. MANDEL: Excuse me. I am objecting to that on the ground it calls for a legal conclusion.

MR. SHAW: Accounting conclusion.

MR. MANDEL: Legal conclusion.

THE COURT: I will let you cross examine on that, Mr. Mandel. Overruled.

Q Now, if I may, your Honor, to simplify things I would like to stand alongside of Mr. Brout because there is a document which is appended to Exhibit I in evidence which is called the Capital of December 31, 1970.

That appears, Mr. Brout to be divided into cash and securities capital accounts before distribution. There are a list of the general partners and a list of the limited partners. Is that correct?

A Yes, it is.

Q Did the Peat, Marwick & Mitchell personnel who went over the documents and prepared this statement make a determination as to the capital account for each and every partner, general partner and each and every limited partner of Newburger, Loeb as of December 31, 1970?

A Correct.

Q There appear to be eight columns alongside each partner's name. The first of these is called either the debit, credit, net ledger balances in the accounts. What does that mean?

A That's a starting point which in this case I believe was the balance as of the beginning of the calendar year 1970.

Q The second category is called "Market Value ofSecurities." What does that relate to, sir?

A That refers to certain securities held as part of the partners capital but separated from it, at the beginning of the year.

Q The third is "Partners' Net Equity (Deficit)". What is included in that category?

A Simply the total of Columns 1a and 2, opening balance plus the second, which was segregated for stock exchange purposes.

Q The next three columns seem to be subsumed underneath a description called "Distributive Share". The first of these three columns is called "1968-1969 Back Office Losses," the second "Unrealized Losses on Exchange Memberships," and the third is called "The 1970 Operating Losses."

Could you tell us what each of those three categories is?

A The first column, "The Back Office Losses", constitutes losses which were not allocated among the partners as of the beginning of 1970 but were allocated in accordance with an agreement among the two partnerships, a predecessor or partnership and the 1970 partnership. I am not sure whether that has been alluded to before. And reflects that one particular allocation. These are ways in which these three categories of losses were divided up among the partners. So Peat, Marwick in the interest of clarity of exposition broke up the losses which were allocated differently among the partners in three different columns.

MR. GRUTMAN: I have one extra copy, your Honor. Could that be held by the middle juror and perhaps the rest of the jurors could look on.

MR. MANDEL: I have a second copy with some pencil notes on which should be disregarded.

Q So we can all look at this together, we are reading the 4th, 5th and 6th categories, concluding the next one would be "Unrealized Losses on Exchange Memberships."

What does that relate to?

A That relates to losses resulting from fluctuations in the market value of certain memberships, from the New York Stock Exchange and I am not sure what other exchange memberships there were in this case, but that is allocated even though the loss has not been realized and the seat has been sold.

Q The next is called "1970 Operating Loss."
What is that figure?

A That is the distribution of the losses for the year other than those occasioned in the first two categories.

Q Starting with that, as you run down the list of the approximately 20 general partners and about the nine or so limited partners, the numbers are all different. Could you explain to us how it happens that, for example, Leo Stern has for the 1970 operating loss the number 277,504 next to his name, and Charles Gross has next to his name 538,683; could you explain those figures illustratively?

MR. MANDEL: You have the wrong line.

Q I am sorry, 428,996 for Charles Gross. Would you explain what that means, Mr. Brout?

A Well, all partners did not share the same percentage of profits and losses -- in this case losses. A partner's share of the operating loss would depend on how long he continued as a general partner. It would depend on the percentage of the partnership owned by him. It would also depend -- well, in that case, operating losses, those are the two factors which would account for variances.

Q Now, you come to the next and last column and that is called "Total Distribution."

What is that figure?

A That figure is simply the total of the prior three colums, preceding three columns.

Q And the last column says "Partners Net Equity (Deficit) After Distributions."

Do you see that column?

A Yes.

Q Where a number in that column appears in parenthesis, does that mean that that is a negative number?

A Correct, a deficit.

Q Meaning a deficit, something less than zero or something less than a positive number. And were the numbers which appear in that column are not embraced within parentheses, what does that mean?

A That's a positive figure and that represents the positive capital account.

Q As you go down the list of partners, beginning at the top of that column, let's just Leo Stern for example. At the beginning of the year Leo STern's capital was $1,241,379. At the end of the year his net equity was a positive figure of $673,878; is that correct?

A Yes.

Q And the difference between 1,241,379 and 673,878, which he was left with at the end of the year, is accounted for by what?

A By the total distribution column, representing the three categories, back office losses, unrealized losses on exchange membership, and 1970 operating losses.

Q From that, Mr. Brought, does it mean -- withdrawn.

Does a partner's capital in a firm remain fixed and immutable for all time?

A No. It varies with the profits and losses and withdrawals of the capital in the event there is some, if new capital is added by a partner that would also tend to increase it.

Q Do I take it it is subject to fluctuations up and down?

A Yes.

Q Look at Charles Gross, Charles H. Gross. At the beginning of the year what is the figure for his opening capital?

A $897,603.

Q And at the end of the year what is the figure for the net capital in Newburger, Loeb & Company for Charles H. Gross?

A $129,561.

Q Is that the amount of his capital?

A Yes, it is.

Q At the end of December 1970?

A Correct.

Q And from your examination of the work papers of Peat, Marwick & Mitchell was the same formula used in ascertaining the capital of Mr. Gross as it was for each and every one of the other general partners?

A Same formula was used with one proviso: Mr. Gross, and several other partners, withdraw during the year. Therefore, their distribution of the operating loss, the 1970 operating loss, was computed in accordance with the partnership agreement.

Q That is when, in accordance with the agreement?

A In accordance with the agreement which provides for a formula for a partner who withdraws as of a certain date during the year in determining his share of the profits or losses for the year.

Q And was Mr. Gross' capital computed in accordance with that formula?

A Yes.

Q From your examination of the records, Mr. Brout, can you say whether or not treatment and the ascertainment of Mr. Gross' net capital was in accord with generally accepted accounting practices consistently applied?

A Well, I can say it was computed in accordance with the partnership agreement, to the extent I saw that.

Q Was it consistently applied?

MR. MANDEL: I object to the statement that it is computed in accordance with the agreement as he understood it. He is an accounting expert. It is for the Court to interpret the agreement.

However, your Honor, I will make it simple. I have stated my objection for the record. May I have it on cross and take it that way?

THE COURT: Without any question. Overruled.

Q So far as you can see from the audit you made from the ledgers and on the documents made available to you, was the Peat, Marwick, Mitchell audited statement for 1970, Exhibit I, prepared in accordance with generally accepted accounting principles?

A I saw nothing which would indicate it was not prepared in accordance with generally accepted accounting principles. Remember, I did not examine all the work papers and therefore I could -- I did not conduct my own independent examination so I could not give an opinion such as that. I did not see anything which indicated there was anything wrong with that examination.

Q From what you saw did it appear to be in accordance with generally accepted accounting practices?

THE COURT: He answered that question.

MR. GRUTMAN: Fine.

Q When we speak about generally accepted accounting practices, Mr. Brought, what is it we are referring to?

A Generally accepted accounting principles, you mean?

Q Yes.

A These are principles which have been developed over the years and are distributed generally throughout the profession by the American Institute of CPAs in this country and other bodies in other companies. These principles are applicable to all financial statements examined by certified public accountants who are members of these bodies.

Q And are those principles regarded as

authoritative by the accountants in the United States?

A Yes.

Q Would you tell us in accordance with those principles as you understand them, Mr. Brout, when a loss is sustained under a leasehold and while someone is still a partner in the partnership which is the lessee under the leasehold, in accordance with generally accepted accounting principles when should the loss be recognized?

MR. MANDEL: I am objecting to that question because it is without foundation.

MR. GRUTMAN: There has been some testimony in the case concerning the loss that was sustained, for example, on the New York Plaza leasehold. It is to that issue which I am addressing this question.

THE COURT: Yes, but I think that Mr. Mandel says that there isn't enough fact input at this point to justify the witness answering it.

MR. GRUTMAN: If that is so, I want to adhere to the time schedule I self-imposed upon myself, your Honor.

I have no further questions.

THE COURT: Very good.

Mr. Mandel, any questions?

Mr. Shaw, any questions?

MR. SHAW: I do, your Honor. You want me to go first?

THE COURT: Yes.

CROSS EXAMINATION

BY MR. SHAW:

Q Now, Mr. Brout, what is that exhibit number before you?

A I, sir.

Q Is it correct that Exhibit I sets forth the financial affairs of the partnership as of December 31, 1970?

A Financial affairs, yes, on the basis stated in the Peat, Marwick opinion which is part of the statement.

Q Does Exhibit I set forth the financial affairs of the business, the partnership, as of January 1, 1971, the next day?

A No, it does not.

Q Does it set forth the financial affairs of the partnership as of December 30, 1970, the preceding day?

A No, it does not.

Q So, in other words, the financial statement set forth -- withdrawn.

Q Does that Exhibit I set forth the financial affairs of the partnership as of the close of business on

December 31, 1970?

A That is the common accounting assumption, yes. That as of the close of the business on the day of the statement.

Q So as of that moment or that day, that gives a businessman an idea regarding the financial affairs of the partnership; correct?

A The metaphor that we like to use is it takes a picture as of a point in time.

Q Picture as of a point in time. Now, does Exhibit I show what would happen if a business ended as of the following day?

A No, because under --

THE COURT: The answer is no.

Q What does the term financial statement on a going business basis mean?

A The financial statements are prepared on a basis in accordance with generally accepted accounting principles with the business continuing, what we would like to call, a going concern. A going concern is an assumption we make that the company will continue in business for a reasonable period following this statement, whatever reasonable would be.

Q Is the financial treatment given or the mathematical treatment given on the figures made upon the assumption that there is a going concern that you are dealing with?

A That is the general accounting assumption, yes. Unless the statement says otherwise.

Q Does that statement say otherwise?

A No.

Q Now, Mr. Brout, Mr. Grutman asked you questions with respect to whether or not the capital account constitutes a debt owing by the partnership to any particular partner, and I believe you said no, it does not. Does the capital account as shown in a partnership financial statement show any debt insofar as the statement capital account, owing by any particular partner to a partner? In other words, does it show a debt between the partners?

MR. MANDEL: I object to the form of the question. It ir irrelevant also.

MR. SHAW: Maybe I can rephrase the question.

Q Is the capital account, assuming it is a positive figure, money owed by a partner to another partner?

A No, it is not.

Q Can you make any conclusion or assumption or give us any opinion based upon your analysis of that financial statement as to the nature of the business and the state of affairs of Newburger, Loeb as of December 31, 1970?

MR. MANDEL: I object to the form of that question and it is irrelevant. This witness is purporting to interpret a year end financial statement. Now what are we getting into?

MR.SHAW: I am trying to estaboish whether this witness can tell us based upon the financial statement, which I am sure he has seen many financial statements in his career, how was business on that day.

THE COURT: I thihk we have gotten direct evidence of that from participants along the line. I will sustain that objection.

Q Now, could you turn to the first page -- the second page, rather. What is the second page of Exhibit I?

A It is a statement of financial condition as of December 31, 1970.

Q And what is a statement of financial condition?

A It is a balance sheet showing assets, liabilities and capital.

Q Again as of the close of business, December 31, 1970.

A Right.

Q Now,will you tell us what the capital of

Newburger, Loeb & Company was as of the close of business December 31, 1970?

A The capital is under the caption "Capital And Subordinated Liabilities."

Q At the bottom of the page?

A Yes. And the capital of the firm is shown at $1,652,615.

Q Now, above that there is a figure, correct?

A Yes.

Q What is that figure?

A That represents subordinated debt, debt which is owed by the firm to lenders who have agreed to subordinate their claims to other creditors, general creditors.

Q Now, is capital made up of two types of capital accounts?

A Capital itself?

Q No, the capital figure $1,652,615.

A No, there is only one type of capital.

Q Are there not limited?

A I am sorry. If you refer to Schedule 1 you will see it consists of limited partners capital as well as general partners capital.

THE COURT: But that is different sources, not different kinds.

Q What was the total capital of all the limited partners as of December 31, 1970 at the close of business?

A $2,147,865.

Q And what was the total capital of all general partners as of the close of business December 31, 1970?

A The aggregate figure was a deficit of $495,250.

Q Now, with respect to the total capital of $2,753,093, does the financial statement also give the current liabilities as of the close of business December 31, 1970?

A It does.

Q What were those current liabilities?

A They aggregated $946,063.

Q Now, just based upon this financial statement, if on December 31, 1970, all current liabilities had been aid and all subordinated lenders had been paid and reocgnizing that the financial statement is prepared on a going business basis, what would have been left over?

A Assuming you found something to pay them, because the cash account is not that big, but assuming you converted assets to cash, what would be left over? 2 million -- and the subordinated lenders paid?

Q Yes.

A $1,652,615.

MR. SHAW: Thank you.

THE COURT: Anybody else wish to cross examine?

MR. MANDEL: Yes, your Honor.

CROSS EXAMINATION

BY MR. MANDEL:

Q Can we be clear about this immediately, that in all the figures you have been talking about, about capital shown in assets and liabilities, you have shown no value whatsoever for the money owed by the general partners in deficit positions? Do you understand my question, sir?

A I wish you rephrase it. I am not sure I do.

Q When on Page 2, which you have just been testifying about, right?

A Yes.

Q Which shows assets and liabilities; right?

A Yes.

Q Does not give any value as an asset for the money owed by the general partners who are in deficit positions?

A This is not included as a liability of the firm, that is correct.

Q Not included as an asset of the firm or a liability?

A Correct. It is included in the capital account.

Q It is ignored; right?

MR. SHAW: Objection, your Honor.

THE COURT: Overruled.

Q It is ignored entirely on page 2 showing assets and liabilities?

A Just as the assets of the firm do not include partners in deficit position, the liabilities in the firm do not include partners in a capital position.

Q So that if you were really talking about what the real capital of the firm consists of, as a layman understands it, you would incclude somewhere the fact that there is good capital in the hands of the firm and the fact that some of the partners owe a million and a half to the firm?

A In liquidation --

Q I am not talking about liquidation.

MR. GRUTMAN: He is not being permitted to answer.

THE COURT: The question is proper. Go ahead.

A As I stated before, this was prepared on the basis of a going concern. In the event of liquidation these partners would have to pony up their share.

MR. MANDEL: Move to strike.

partners would have gone bankrupt. If Mr. Mandel represents to the Court that he is going to prove something other than that I will withdraw my objection.

THE COURT: I thought his question was fine until he added "presumably they could pay." But if the money is owed his question is proper on the record as it now stands.

MR. GRUTMAN: Like Mr. Buckley owed money and cound't.

THE COURT: Maybe he could or couldn't. We don't know.

MR. SHAW: There is testimony to that effect, your Honor, I am sorry.

THE COURT: Of one man.

MR. GRUTMAN: Bialkin and Steefel.

THE COURT: They are the lawyers and rot the clients.

MR.MANDEL: We also have in the record,your Honor, to make it clear, that in fact these partners paid over a million dollars.

MR. SHAW: Partners and their wives.

THE COURT: So this is an area that is yet somewhat murky. Let us put the question on the basis of dealing with this gentleman who is here really as an expert in the field of accounting, has no personal knowledge of any of the facts in this case.

Would you expect, sir, that to present an accurate picture a partner who owed money to the firm syould have that shown as an asset of the firm?

THE WITNESS: No, I do not.

Q You say the accounting convention does not permit it?

A Does not require it.

Q But you also said --

A I say does not require it.

Q Does not require it. But you also said, did you not, sir, that if you were required to pay people out, you wouldn't have enough to pay them and the reason is that you have omitted a million and a half or so of money owed by general partners; is that right?

MR. SHAW: Objection, your Honor.

THE COURT: Overruled.

A What was the question, please?

THE COURT: Read it back, please.

(Question read.)

A Are you saying this would be a debt of the partners to the firm? Somewhere along the line they would have to pony up the money or else recover through operating profits.

Q And if they paid what they owed, then the results you reached about not having enough money to pay out certain people would be entirely changed, wouldn't it?

MR. SHAW: Objection.

THE COURT: Overruled. He gave an answer saying what would be left on the face of the balance sheet. That was one of your last questions. Mr. Mandel is asking him what would happen if the partners had paid in the money they owed.

MR. SHAW: Obviously if they made money it would go up.

MR. MANDEL: No.

THE COURT: Payments of the partners obligations. Objection overruled.

A If all partners in deficit position put the cash in, then there would be money topay the partners who were not in a deficit position.

Q That's right. And if the partners in a deficit position put in what they owed as deficit -- right? I am giving you a hypothetical question. There would be enough money to pay general creditors in full; right?

MR. SHAW: Objection, your Honor. How would he know? The record is getting totally mauled.

The only thing he said he has analyzed the financial statement as of December 31, 1970, which shows general creditors as of that point of $900,000.

Now he is being asked to project what would have happened if ten months later.

MR. MANDEL: Not 10 months later.

THE COURT: As of that very day.

Your last question, Mr. Shaw, is what would be left over for various people on the face of this balance sheet. Mr. Mandel says what if they paid in the money they owed, then what?

MR. SHAW: There would have been more left over. There is no question about that. Why are we arguing about it?

THE COURT: Overruled.

A If all partners who had deficits which totaled say a million two, million three, paid in the million two, million three, then the general creditors which presumably with a current liabilities picture of $946,000 could have been paid off and there would have been cash in the bank.

Q And the limited partners could have been paid in full?

MR. SHAW: Objection, your Honor.

THE COURT: Overruled.

A No. You wouldn't get that much cash --

Q We are not talking about cash. Before you were always talking about using the other assets and attributing value to them, weren't you? I am asking you to make the same assumption.

A Just the opposite.

Q Sir, if you rewrote the balance sheet to include what was owed by the deficit partners, would you then have enough money to pay general creditors and subordinated?

A Not enough cash. You would have more assets.

Q We will talk about assets.

A Converting your other assets to cash.

Q You would have enough assets to pay limited in full, would you not?

A Assuming you converted your other assets to cash, right.

Q You would have enough assets to pay withdrawn generals in full, would you not?

A Assuming you converted the assets to cash -- let me qualify that again by saying not at a loss.

Q At their book value which might be higher or lower; right?

A Yes, you could.

Q All right.

Now, did you happen to notice in your examination that in fact about a million dollars of deficit capital was paid in by the deficit partners?

MR. GRUTMAN: Paid in by them and their wives and that's all the difference in the world.

THE COURT: Did you happen to notice that in your examination?

A No. My examination cut off at December 31st.

Q You stopped?

A Very narrow.

Q The wall came down and you didn't look further; right?

MR. SHAW: Objection.

MR. GRUTMAN: Objection.

THE COURT: All right.

Q Have you ever heard the phrase "Garbage in, garbage out"?

MR. GRUTMAN: That's a computer phrase, not an accounting phrase.

THE COURT: Let's find out.

A Abbreviated it is Gigo, G-i-g-o.

Q Without being offensive to your profession, sir, isn't it true that to a substantial extent decisions made, which are reflected by the accountants in their papers, are decisions made by management?

A Oh, yes.

Q And in your examination of this particular account as of December 31, 1970, didyou see that large writeoffs were made after the end of the year?

A Let me say that I did not examine these accounts. I examined work papers in connection with these accounts.

Q And your examination of the work papers, did you see that large write-offs were made after the end of the year?

A No. I saw journal entries which were made as of the end of the year.

Q Did you see journal entries reflecting write-offs?

A Most journal entries do reflect valuations of accounts. Could be write-offs or not.

Q Now, did you see that the source for a lot of the information was Mr. Risher?

A No, I did not.

Q Now, you know, do you not, that it is customary for accountants to ask managment to give them instructions on important items and sometimes to ask for the opinion of cou sel in connection with those items; right?

A Quite right.

Q Now, I show you a letter of January 11th from Peat, Marwick, Mitchell & Company --

MR. GRUTMAN: Why don't you come down, you are beating the wronghorse..

THE COURT: Mr. Grutman, no comments, please.

MR. GRUTMAN: I would like to say, Mr. Brout, as we know, is trying to catch a plane. The Peat, Marwick people, for whom this might be the proper--

MR.MANDEL: Oh, no.

THE COURT: Let's go forward with the next question.

Q Mr. Brout, will you be sure to give your father my regards. We worked together many years ago..

MR. GRUTMAN: I know him longer than you.

Q Mr. Brout, you said Peat, Marwick, Mitchell & Comapny is probably the largest in the world.

A I didn't say the best.

(Laughter.)

Q Now, I show you a document dated January 11th from Peat, Marwick, Mitchell and ask you if you examined that in the course of your examination of the accounts.

A I read a copy of this letter which I am afraid was not in as good shape as yours. I did see the letter.

Q All right. Now, this letter tells you, does it not, that the accountants were asking the businessmen to make certain decisions for them and to get opinions of counsel on certain questions; is that right?

A That's right.

Q And this letter tells you oddly enough that the man they were asking was not a partner of Newburger, Loeb but Mr. Paul Risher; is that correct?

MR. GRUTMAN: That's objected to.

THE COURT: Overruled.

A The letter is addressed to Mr. Risher at Newburger, Loeb & Company. I didn't know what his status was at that time. It was after December 31st.

Q Now, do you happen to remember what these various important matters were that Peat, Marwick ask for instructions on?

A I recall some of them, yes.

Q Did they have to do with writeoffs?

A And valuations, yes.

Q Which ones do you remember?

A Well, it's been some time since I reviewed that letter. I can recall them going into how the back office should be allocated in accordance with the agreements. I can recall -- I am sure if I would refresh my recollection I could answer. I looked at this about a month ago on a very poor copy. It had to do with substantial items.

Q You testified something about cancellation of lease commitments --

MR. GRUTMAN: That is a question I asked and your Honor said I couldn't ask it.

THE COURT: Yes, I sustained that.

Q Do you remember that there was a qeustion of the distribution partners of unamortized leasehold improvements on offices or office space? Do you remember that or not?

A Yes, I do.

Q Do you remember there was a question of the distribution to partners of unrealized gains or losses on investments in securities; do you remember that?

A I believe I do, yes.

Q Do you remember what the answer was?

MR. GRUTMAN: I object unless we can have the answer.

MR. SHAW: And the question.

MR. GRUTMAN: Mr. Silverman was shown everything to refresh his recollection. He has had nothing.

MR. MANDEL: This is cross examination.

THE COURT:It is cross examination.

A I don't recall the answers to those particular items.

THE COURT: I may show him anything you want.

A A copy of the letter received from the recipient in the Peat, Marwick work papers was even worse than the copy of the questions.

Q Let's talk about this. Forget what was said in the letter. In the computation of assets were there certain securities having significant values in the portfolio or shown as being owned by the firm?

A I did not review the statements of the assets.

Q You don't know whether those were carried at market or cost or at no value; right?

A Right. My examination did not cover it. The basic financial statements themselves. I did not do an examination of the financial statements.

Q Did you review all of the footnote questions asked in the Peat, Marwick statement?

A No, I did not.

Q You didn't examine those at all to see if they were right or wrong?

A No.

My examination consisted of reviewing certain portions of the Peat, Marwick work papers, including the statement of capital account but I did not review the work papers leading to valuations of securities nor fixed assets, furniture and fixtures, leasehold impreovements, nor of the write-downs of which you are questioning.

Q Did you review the footnote of Peat, Marwick which says "2 limited partners with an aggregate capital account balance of 150,000 were not party to the agreement."

Did you notice that?

A Yes.

Q Did that take any -- did you give any account to that in your testimony?

MR. SHAW: Objection. His testimony speaks for itself.

THE COURT: Overruled.

A Did I take any account of that in my testimony?

Q Yes.

MR. SHAW: Objection.

THE COURT: Overruled.

A I don't know the question. I am sorry, I don't know what the question purports to be.

Q Now, do certain underlying assumptions regarding the partnership agreement get incorporated into a statement such as the Peat, Marwick statement?

A Yes, they do.

Q Did you undertake to make a review of how Peat, Marwick treated the situation of a withdrawn partner?

A Yes, I did.

Q In what respect did you do that?

A I was given certain portions of the partnership agreement and I read the financial statement audited by Peat, Marwick & Company and arrived at my own conclusions as to whether or not the statement as to the partnership capital had been computed in accordance with the partnership agreement, including the liabilities or the capital allocated to withdrawing partners.

Q Did you make any assumptions in talking about who would get paid out first as to whether a withdrawn partner, like Mr. Gross, would be paid ahead of limited partners or behind limited partners?

A No, I did not.

Q Were you asked to look at that question?

A No, I was not.

Q And your testimony is not intended to reflect any opinion on that question?

A I have drawn no conclusions or have any opinion with respect to it.

Q So when you said that limited partners would be paid after subordinated lenders, you did not mean to say that withdrawn general partners might not be paid ahead of the limited?

MR. SHAW: Objection to form, your Honor.

Q Can you answer my question?

THE COURT: Why don't you put it again, Mr. Mandel.

MR. GRUTMAN: I must object because these questio are asked as to what would happen in --

THE COURT: Let's not put some factors in here. We are having questioning going along on a subject and we are doing very well.

MR. SHAW: I object because I understand that the question is your testimony doesn't mean such and such. That is argumentative.

THE COURT: Put a new question.

MR. GRUTMAN: Can we hurry it along?

MR. MANDEL: Please don't do that, Mr. Grutman.

Q Now, you were talking about the amount of capital or the amount of money which would be available on certain hypotheses; is that correct?

A Yes, your hypothetical question.

Q On direct also if I recall.

You said so much money would be available or needed to pay general creditors; do you recall that?

A $967,000 was necessary to pay general unsecured creditors.

Q All right.

A 946,000 rather.

Q Now, I am saying to you -- then you said who would be paid after that; right?

A I think I said so.

Q How much money after the general creditors would be necessary to pay withdrawn partners such as Charles Gross?

MR. GRUTMAN: Objected to.

MR. SHAW: Objected to.

THE COURT: Overruled.

A I don't have the figures on the statement as to which partner shown in the list were withdrawn partners.

Q You didn't know and you didn't consider that question?

A Correct.

Q And you weren't asked to consider that question?

A That's right.

Q You weren't asked to consider --

MR. SHAW: Objection, your Honor.

THE COURT: No, no.

A I was not asked to consider.

Q You were not asked whether the general partners who were withdrawn would be paid prior to limited partners who were still in the firm?

A No priority questions were asked of me and I considered none.

Q Now, you testified too, sir, that the partners in deficit didn't owe the money of their deficit to any particular partner; isn't that what you said?

A They did not. They owed it to the partnership.

Q They owed it to the partnership; right?

A Some day or other they will have to pony it up.

Q Not some day or other, they owe it on that date; right? At that moment of time, that slice of a frozen cross section that you accountants love to deal with, at that second, as far as you know, those partners in deficit were required to pony up? Yes?

MR. GRUTMAN: You don't necessarily have to get an answer if he can't give it to you.

A This woulddepend on whatever the terms of the agreement was between the partners as to when they had to come up with their deficit capital.

Q Did you see any agreement that it should come up later than earlier? You said you looked at the agreement.

A I don't recall seeing that particular provision of the agreement because, as I said, I was only exhibited certain portions of the partnership agreement.

Q Who picked the portions for you to look at? It wasn't me, was it?

A No.

MR. MANDEL: I have nothing further.

REDIRECT EXAMINATION

BY MR. GRUTMAN:

Q Does anybody get paid out, whether as a general partner, withdrawn general partner, limited partner or subordinated lenders, until a balance is struck and an accounting taken?

A No, not normally.

Q When I say a balance struck, whatdoes that mean in layman's language?

A A balance sheet prepared.

Q You mean claims of the partnership against the partner and the partner's claims against the partnership?

A And an accounting had, yes.

Q That's the crucial way by which that is done?

A Yes.

Q When you answered the question I put to you and which Mr. Shaw put to you about the capability of the Newburger, Loeb & Company partnership to pay money out, was that based upon the reality, as the financial statement disclosed as of December 31st?

A That's all it is based on.

Q Hypothetically if Newburger, Loeb had won the lottery or discovered gold or copper on the premises a million dollars became available that might change your answer?

THE COURT: Sustained.

MR. GRUTMAN: No further questions.

RECROSS EXAMINATION

BY MR. SHAW:

Q Until a balance is struck between a withdrawn partner and a partnership, does the withdrawn partner have the right to receive from the partnership any sum of money?

MR. MANDEL: I object.

THE COURT: Sustained.

MR. SHAW: No further questions.

MR. MANDEL: Unfortunately there was something I did not ask.

RECROSS EXAMINATION

BY MR. MANDEL:

Q Did you become aware there was a difference between committed capital and excess capital in the Newburger, Loeb partnership agreement?

A I do recall that distinction.

Q One of the reasons Charles Gross had good capital left over when so many of the partmers were in deficit is that he had contributed more than twice his committed capital; is that correct?

MR. SHAW: Object to the use of good capital, your Honor.

THE COURT: Strike the last part of that question.

You may answer it.

A I don't recall the magnitude of his contribution of excess capital but there is a distinction drawn in the partnership agreement between excess capital and committed capital and I believe Mr. Gross had excess capital.

Q Do you happen to recall --

A At some stage of the year.

Q Do you happen to recall Mr. Gross' committed capital was 412,000?

A I have a vague recollection. I don't recall the exact figure but I remember he had something like that.

Q So that when he had an actual starting capital of 897,000 -- you testified about that figure.

A That's what the statement shows.

Q -- that meant that he had put in as additional capital the difference between 412,000 and 897,000; right?

A That was the picture at the beginning of the year.

Q Do you also recall that the partnership agreement has a provision in it saying that a partner may withdraw his excess capital at any time on short notice. Was that part of the partnership agreement shown to you?

A Yes.

MR. MANDEL: Thank you.

RECROSS EXAMINATION

BY MR. SHAW:

Q I believe that you indicated in response to Mr. Mandel's question that you knew that Mr. Gross had certain capital and had withdrawn it; correct? He was a withdrawn general partner?

A He had capital and as far as the work papers indicate he withdrew as of September 30, 1970, effective then

Q He withdrew prior to December 31, 1970?

A Yes.

Q And in that financial statement he is carried in the financial statement as a partner; correct?

A Yes.

Q A general partner?

A Yes.

Q And he is not shown on the financial statement as a general creditor?

A Correct.

Q Is that ordinary and customary accounting practices?

A Well, I think this goes to a question of the interpretation of the partnership agreement here rather than generally accepted accounting principles. Normally when a partner withdraws from a partnership, the partnership terminterminates as of that date and there is an accounting had, a balance struck and whatever is left over is divided among the, in this case, the partnership agreement would govern and therefore the partner under this particular partnership agreement I believe is treated as a partner for a period of one year.

Q He is carried there as a general partner; is that correct?

A Yes. With respect to the outside world as far as outside treatment.

RECROSS EXAMINATION

BY MR. MANDEL:

Q We are getting into the agreement itself now. In response to Mr. Shaw's question, this particular partnership agreement provided that on such and such a date he ceased to be a partner for all purposes; do you recall that?

MR. GRUTMAN: I object unless the document is shown to him.

THE COURT:Overruled.

MR. MANDEL: He remembers that or doesn't.

A A partner for all purposes?

Q Yes.

A I believe thereis a proviso.

Q Such as tha. But there is also a proviso that the proportion of his loss for the year is determined by the proportion -- by a ration based on the proportion of the business of the year done prior to the date of this effective withdrawal; do you recall that?

A Yes. The formula calls for a gross income, which is a defined term, in this particular instance, not defined by the partnership agreement but by general usage among the partners. The gross income up to the effective date of withdrawal has a numerator over gross income for the year, as the denominator, the resulting fraction is multiplied by the net income, or in this case loss for the year, to arrive at a share for withdrawing partner and multipled by his partnership profit sharing percentage.

Q I would like to use an example, if I may, and I hope to make this otherwise, with due respect, impenetrable testimony clear --

MR. GRUTMAN: I object to that, Judge.

Q Is this a good example, that if a partner withdraw at the end of the 4th month but when the year was over half the business of the year had been done in those first four months, then his share of the loss or profit would be one-half of the sum which I would have had if he had stayed for the full year; is that your understanding?

A Well, his share -- if one-half of the gross business is done for the first four months --

Q And he withdraws effectively at the end of the fourth month. We will say he had a 10 percent share --

A He would then have 50 percent of the losses as there would have been were it used for the entire year. That's what the partnership calls for in Provision 8.1, I believe.

MR. MANDEL: Thank you.

THE COURT: Thank you, sir. You may step down.

(Witness excused.)

THE COURT: We will take our recess.

(Recess.)

(In open court; jury present.)

ARTHUR SILVERMAN, resumed.

CONTINUED DIRECT EXAMINATION

BY MR. MANDEL:

Q Mr. Silverman, am I right where we broke off you had read to the jury a letter from Persky and a letter from Newburger saying that if Miss Bleich doesn't come back into the deal by February 4th, that the whole thing was dropped and counsel could go to the ballgame on February 11th, or whatever they wanted to do, something like that; is that where we were?

A Yes. If she hadn't retracted her declining to go along by 4 p.m. on the 4th of February, the closing would be cancelled.

Q Did Miss Bleich change her position by 4 p.m. on February 4th of 1971?

A She did not.

Q What happened next?

A I received a telephone call some time during February 4th from Mr. Persky and wanted to know whether it would be productive if a meeting were held with Gross' counsel. I said I did not know, that he should call you, who was Charles Gross' counsel, and find out. If the meeti[illegible]re held I did offer the conference room at my law firm for that meeting, and that was the substance of the conversation on the 4th.

Q Was a meeting in fact held on February 5th of 1971 at the offices of Golenbock & Barell?

A Yes. There was a meeting which started at about 9:30.

Q Who attended that meeting?

A Quite a few people.

Q Was Mr. Philip Mandel there?

A Yes.

Let me try to recall as best I can. You were there, Donald Newborg --

Q Who is Donald Newborg?

A Donald Newborg was an attorney who was the executor of one of the estates; I don't recall which one. Ned Frank was there, Paul Risher, Bob Muh, Mr. Persky, Mr. Sttfel, Dave Abrams from Arthur Richenthal's office, Mr. Burak, Donald Shack, a partner at my firm, I was there, and there were toehrs there. I have a copy of a list of people who were there and I could refresh my recollection if I looked at that list.

Q Would you do that, please.

A Charles Lewis was there, a Mr. Isaacson, whom I just don't recall seeing on the list; Mr. Dworkin. I guess I named all the others.

Q What what the subject of that meeting?

A The subject of that meeting was essential for -- the subject of that meeting were negotiations and statements of position by you and by others at that meeting concerning Charles Gross.

Q In connection with what?

A In connection with the proposed sale of assets of Newburger, Loeb to the successor corporation.

Q In connection with that discussion did anybody hand you a formal piece of paper?

A Yes. Prior to the commencement of the meeting I was sitting away from the conference table in the northeast corner of the room. Mr. Persky got up and came over to me and handed me an unsigned summons and complaint.

Q I show you a document which has been labelled "Defendant's Exhibit X for identification," and ask you if that was the piece of paper which Mr. Persky handed to you.

THE COURT: What's the date of this meeting again?

MR. MANDEL: February 5, 1971.

A Yes, it is.

MR. MANDEL: I offer it in evidence.

MR. GRUTMAN: It is in evidence.

MR. MANDEL: No. Just information it says.

THE COURT: Any objection?

MR. SHAW: I object on behalf of the defendants whom I represent.

MR. GLATZER: Same objection on behalf of my defendants. I don't believe Mr. Persky's testimony was to the effect that they authorized this in any way. The complaint is in the name of partnership as well and they weren't partners.

MR. MANDEL: Shall I be heard on this?

THE COURT: I will take it subject to connection. It is clearly admissible against Persky, Finley, Kumble, the partnership and the corporation. I will take it subject to connection against the balance.

xxx (Defendants' Exhibit X was received in evidence.)

Q Mr. Silverman, did Mr. Persky say anything to you when he gave you Defendants' Exhibit X?

A I asked him a question at the time he handed this to me and he responded to me.

Q What was your question?

A I said "What is this, Bob?"

Q What did he say?

A He said "You don't think Charley and Mabel are going to get their money without a fight ifthis deal goes through without their consent, do you?"

Q Did you have any further discussion with Mr. Persky about Exhibit X at that time?

A I did not.

Q Did you keep that copy of Exhibit X?

A I did. Not that copy, I kept Exhibit X.

Q This is the actual document?

A This actual document, yes.

Q Now, does Exhibit X contain a summons?

A Yes, it does.

Q On whose behalf is the summons drawn? Who is

THE COURT: I will permit somebody to read it. It is a question of whom.

MR. MANDEL: Shall I read it or Mr. Silverman?

THE COURT: You may read it.

MR. MANDEL: Dealer's choice.

THE COURT: You may read it.

MR.MANDEL: Your Honor, I take it if I omit certai paragraphs that will not be offensive to anybody?

THE COURT: You read to the jury such portions as you feel you wish to call to their attention at this time.

MR. MANDEL: All right, your Honor.

(Paragraph 7 of Defendants' Exhibit X in evidence was read to the jury by Mr. Mandel.)

Q Now, Mr. Silverman, during the course of that meeting on February 5, 1971, in the presence of the persons you have already named, did Mr. Mandel -- did Mr. Persky say anything else about Charles Gross?

A Well, there were discussions concerning what possibilities existed for giving Charles Gross securities in the new corporation. There were discussions concerning whether or not he would receive any cash. There were also discussions concerning any claims allegedly which the partnership had against Charles Gross.

Q Did Mr. Persky state any such claims?

A Yes, he did.

Q What claims did he say the partnership had against Charles Gross?

A One of the claims was the Buckley claim. Anothe claim he said existed was a claim of alleged unauthorized trading by Charles Gross in the firm trading account. Another claim was that a lease had been entered into at One New York Plaza and that allegedly the owner of the building had stated that Newburger, Loeb could be let out of that les for $100,000 and that Charles Gross, in violation of his duties, refused to accept that order.

There was a fourth claim that I just don't offhand recall, but my notes of the meeting do reflect that. I could refresh my recollection by looking at that.

Q Would you refresh your recollection, please.

A Yes. It was alleged that Charles Gross had committed the partnership to invest in a basketball team and had commited partnership funds to that investment.

Q Now, Mr. Mr. Mandel make any response to Mr. Persky's recitation of those claims?

A Yes. My recollection is that in general with respect to the whole subject of claims against Charles Gross, your response was that those claims had no merit but if the partnership believed that it had these claims it could make an accommodation with Mr. Gross to have him go along with this transaction and preserve those claims and sue him later.

Q Did Mr. Persky make any response to that suggestion?

A Well, I don't recall that there was a particular response to that suggestion by Mr. Persky, but the subject of releases, and everyone saying this agreement was raised during the meeting.

Q Now, would you describe, please, from your recollection as well as you can, without reference to your notes, the nature of the discussion, the negotations about what Gross wanted to go along with the deal and what other people may have responded to that.

A Well, the meeting started on the note that everybody was there to try to reach an accommodation and make a dea with Charles Gross and that a deal would have to be made that day or not be made at all.

For his part Mr. Steefel was of the view that Charles Gross should receive securities in the new corporation of the same type that limited partners were to receive.

However, he stated that he did not think that it was possible for Charles Gross to receive any cash in addition to those securities.

Mr. Persky said that he did not think that what I will call limited partship securities would be available to Mr. Gross because there were certain general partners, such as Mr. Stern, who were going to be receiving Class B preferred stock and that limited partnership securities was of a higher priority than the Class B preferred stock.

You emphasized that Charles Gross -- I recall the phrase was like a farmer without see. He needed cash. He was a trader, securities trader by experience and by occupation. In order to get himself going again he needed cash or at least securities which were bankable; that is to say, some kind of paper that he could take to a bank and get cash from.

There was -- I recall Dave Abrams saying that let Gross sue. There was Burak who insisted that all the partners sign the agreement. There was a conversation between you and Mr. Risher concerning Charles Gross' becoming employed by Rafkind & Company.

Q Will you describe what that was about?

A Yes.

Mr. Steefel had said at the beginning of the meeting that if Charles Gross went along with this deal he could do things on Wall Street. Charles Gross didn't.

If Charles Gross didn't go along with this deal he would be tied up in litigation for a long period of time.

Later on in the meeting Mr. Risher said -- he said something relating to Rafkind and I don't recall exactly what it was. I don't recall whether he said that Charles Gross, you saw whatwe did with Charles Gross when he went to work with Rifkind or we will see to it that he doesn't work.

There was something he said --

MR. SHAW: Objection on behalf of Risher. That is not testimony.

THE COURT: Yes. I strike thatout.

We will have to arrive at a best recollection.

Strike it out.

Q Did Mr. Risher say something about Rafkind? Do you recall that?

A Yes.

Q And did Mr. Mandel make any response to that

A Yes, he did.

Q What was that response?

A The response that you made was that the letter which Newburger, Loeb had sent to Rafkind & Co. that there was a letter that had been sent and it was a terrible mistake that the partnership sent that letter to Rafkind & Co. because that letter constituted an unlawful interference of Charles --

MR. SHAW: Objection unless we have the letter in evidence.

THE COURT: Overruled.

A Interference with his employment opportunities.

There was a response by Mr. Frank, I believe, that the letter was sent because of a restrictive covenant in the partnership of Newburger, Loeb which forbade a partner in the firm from becoming employed in a competitive occupation.

You pointed out that trading a firm account for another brokerage house was in no way competitive because the trader does not deal with any customers.

Q What was Gross supposed to do with Rafkind? Anything he said about that?

A Gross was supposed to become a trader with Rafkind; that is to say Rafkind would make a sum of money for Gross to trade --

MR. SHAW: Objection, your Honor.

THE COURT: Was this discussed at this meeting?

MR. SHAW: Or something that he learned independently?

Q Was this discussed at the meeting?

A What I testified to was discussed at the meeting.

Q Continue.

A I am finished.

Q All right.

Did Mr. Lewis say anything about Charles Gross, do you recall?

A I just don't recall. I think -- he said something in that meeting and I'd have to look at my notes to refresh my recollection.

Q Look at page 3, please.

A Without even looking at it, as I pick up I recall.

MR. GRUTMAN: What exhibit, please.

MR. MANDEL: 28-R.

MR. GRUTMAN: Could we have it marked?

MR. MANDEL: Certainly.

THE COURT: Let us have our answer.

A He said his clients were not against dealing with Charles Gross.

Q Mr. Lewis was an associate or partner of

Mr. Bialkin?

A He was an associate of the Willkie, Farr firm, and they represented two subordinated lenders, and we are really speaking for all the subordinated lenders.

(Defendants' Exhibit FFF was marked for identification.)

Q Was there a discussion of how much money was owed to Charles Gross?

MR. SHAW: Objection, leading.

THE COURT: Overruled.

A Yes, there was.

THE COURT: What was it?

Q Do you recall the details of that discussion?

MR.SHAW: May we have the person speaking identified so I can make appropriate objection?

THE COURT: You may.

What was the discussion?

THE WITNESS: I am trying to follow the discussion that identify who was speaking.
I can't do that. I recall the substance of the discussion but I don't recall when Mr. Mandel and Mr. Steefel primarily.

THE COURT: The other people you named were present?

THE WITNESS: Yes.

MR.SHAW: I object on behalf of the clients I represent, your Honor.

MR. MANDEL: The exhibit --

MR. GRUTMAN: I object likewise.

MR.MANDEL: All right. If I did something wrong I retract it.

THE COURT: Let us go forward.

Q Was any accommodation or agreement reached during that meeting?

A No. The meeting broke, initially broke somewhere around 1 or 2 o'clock. It reconvened some time later after discussions between you and me on the one hand and Charles Gross on the other.

You came back into the meeting and set forth what Charles Gross wanted and at that point Mr. Steefel got up and said "Charles Gross is a pig," and he left and Bob Persky got up and walked out.

However, the meeting was to reconvene -- this was a Friday and the meeting was to reconvene the following Monday.

Q Getting back to the meeting, before this happened was there any statement by Mr. Mandel of what legal options were available to the persons present if they did not make a deal with Gross or what options were available to them?

MR. GRUTMAN: Objection.

THE COURT: Overruled.

A There were. I recall there were three but I really can only recall of the three two of them.

Q Can you refresh your recollection by looking at Page 4 of your notes?

A Yes.

MR. SHAW: Object on behalf of Aixala.

THE COURT: Subject to connection I will take it. Overruled.

A One alternative you said was that the deal could be dropped and the partnership could be liquidated. The second alternative the deal could go ahead without Bleich and Donoghue, in which you said it would be an illegal transaction --

MR. GRUTMAN: I object. The man is looking at a piece of paper and see if the latter clause he interpolated appears there.

THE WITNESS: I said I refreshed my recollection.

THE COURT: You may cross examine him.

A The third alternative you said was there could be an arrangement --

Q I am sorry, were you interrupted? Did you finish the answer you were giving?

THE COURT: Read it back.

(Answer read.)

A Because you said the transaction required their consent as limited partners.

The third was an arrangement could be reached with Charles Gross and that was against the background of an initial statement that you made at the meeting in which you said it was a fair assumption if an arrangement were reached with Charles Gross, Mabel Bleich and Jeanne Donoghue would go along.

Q Was a statement made by Mr. Mandel at this meeting as to what Mr. Gross' preference was if no acceptable accommodation could be reached?

A Yes.

Q What was that?

A You said that as far as Charles Gross was concerned, his preference was that nature could take its course and as far as he was concerned liquidation was a preferable route.

Q To what?

A Liquidation was a preferable route to going along with the kind of transactions that were being discussed by Mr. Steefel and by Mr. Persky.

Q Now, did Mr. Mandel state what Mr. Gross' options would be if the deal did not go through or what possibilities would be opened to him if a deal did not go through?

A Well, one thing that comes to mind in response to that question is that you stated that as far as Charles Gross was concerned, he felt that he could recoup his money rather quickly if there were general partners with assets because he didn't think there were any claims against him; that he had a right to be paid by the general partners themselves.

Q Were there questions about who should and who should not get releases in connection with these proposed deals?

A Yes, there were.

Q Do you remember who said what?

A I only recall Mr. Burak participating in those discussions. I would have to refresh my recollection by looking at my notes.

Q Would you do that, please.

(Pause.)

A Actually my notes reflect that both Mr. Persky and Mr. Bureak spoke on the subject. Mr. Persky stated that he wanted releases all around and he wanted all of the partners to sign whatever agreement was worked out.

MR. MANDEL: I now offer that document in evidence; FFF.

Any objection?

MR.GLATZER: Objection on behalf of Sloane & Company who were not on the meeting.

MR. SHAW: Objection on behalf of Aixala.

MR. GLATZER: Similar objection to the testimony and motion to strike the testimony about the meeting.

(Pause.)

MR. GRUTMAN: No objection.

(Defendants' Exhibit FFF was received in evidence.)

THE COURT: It is taken subject to connection in accordance with that last objection.

Q Did you attend another meeting on February 8, 1971, Mr. Silverman?

A Yes, I did.

Q Who was present?

A A large number of the people who were present at the meeting of February 5th. However, I believe that Mr. Risher was not present adn certain others were not present. For example, Mr. Shack was not present and there may well have been others. I have a listing of the people present.

Q Rea that, please. Who was present?

THE WITNESS: May I read these, your Honor?

THE COURT: Yes.

A Bureak, Abrams, from the Richenthal firm, Muh, Bob Newburger, Charles Gross was present at this meeting. He hadn't been present at the other. You, me --

Q By you you mean Philip Mandel?

A Yes. Mr. Persky, Mr. Lewis, Mr. Dworkin, Ned Frank, Donald Newborg, Bob Steefel and Mr. Isaacson.

Q And was this another effort to reach a mutually accpetable negotiation?

A Yes.

The subject this time around was esentially getting down to the brass tacks of trying to find out whether there was a financial package that could be put together that would be acceptable to Charles Gross. There was a while series of negotiations that went on for several hours that afternoon with variations of cash and the type of securities in the new corporation and the amount involved. By the end of the day an agreement was reached.

Q You mean a preliminary understanding?

MR. SHAW: Objection, your Honor.

The witness testified an agreement and then Mr. Mandel says "You mean."

THE WITNESS: An agreement in principle.

MR. SHAW: Objection, your Honor. No question outstanding.

THE COURT: I will permit it to stand. If anybody wants to inquire as to what is the basis of the legal conclusion that he has summed up in that one word you are at liberty to do so.

Q Were any papers signed?

A No.

Q Did anybody bind himself to anything?

A No.

MR. GRUTMAN: Objection.

THE COURT: Sustained.

Q Was there an understanding --

MR. SHAW: Objection. He said an agreement was reached.

THE COURT: I will strike out the word agreement. If any of you want to question, I will permit an examination on what he means by agreement.

Q At the end of the day how was it left?

MR. GRUTMAN: I don't understand that question.

THE COURT: Overruled.

A It was left that the various attorneys would disperse and ascertain whether their clients would go along with what had been discussed.

Q And do you know what happened thereafter?

A Yes. Thereafter certain of the individuals involved did not approve of what had been discussed by the attorneys and there was no deal eached with Charles Gross.

Q What is the next thing that you know that happened in connection with thesematters?

A The next thing is that either on the same day, the night of the same day that we are talking about, February 8th, or the morning of the next, and I think it was the night of February 8th, Charles Gross was served by a United States Marshal iwth a federal court action commencing an action against him for upwards of $3.1 million in the Federal Court in California, an action commenced by Mr. Sloane and Mr. Kayne.

MR. GRUTMAN: Objection, your Honor.

MR. GLATZER: Objection. Irrelevant to the issues in this case.

MR. SHAW: Same objection.

MR.MANDEL: Will your Honor take it subject to connection?

THE COURT: I will permit the answer to stand.

MR. SHAW: Your Honor, I would specifically lik to say that this is beyond the scope of the pleadings.

THE COURT: In what respect?

MR. MANDEL: This is not specifically mentioned in the pleadings, your Honor. This is not mentioned in the pleadings but we allege it is one of the conspiratorial acts. It was in Mr. Grutman's opening statement.

MR. GRUTMAN: What?

THE WITNESS: The claims were raised --

THE COURT: Mr.Silverman, you are a witness here to facts.

What about Paragraph 64, the defendant's answer and counterclaims?

THE COURT: Read 64-A.

MR. GLATZER: May we speak to you at the side bar for a moment?

MR. MANDEL: That's exactly right, your Honor.

THE COURT: Well, if there is any purpose to be served in the side bar?

MR. GRUTMAN: Yes. To persuade you out of the hearing of the jury because there may be some merit as to what we are saying.

(At the side bar.)

MR. GLATZER: These lawsuits were brought by Kayne and Sloane individually, not on behalf of the partnership. In California the case was dismissed. There then ensued an arbitration by Kayne and Sloane individually again Mr. Gross for the same -- on the same basis. That went on for 23 or 28 sessions at the New York Stock Exchange. Completely unrelated to this. A private lawsuit.

MR. GRUTMAN: If your Honor said I couldn't get into matters which are specific affirmative defenses in counterclaims because it was going to enlarge the scope of the litigation, I fail to see how you can allow Mr. Mandel to slip in through some kind of amorphous door this kind of garbage. It is a lawsuit unrelated to anything here. It's never been pleaded. He even acknowledge that until he seized on paragraph 64 as some kind of --

MR. GLATZER: The judgment in the arbitration was confirmed last month. It went on interminably.

MR. MANDEL: They said they were going to hound him for the rest of his life and they tried to do it.

MR. GRUTMAN: Four lawsuits by landlords against Mr. Gross. Are those to be part?

MR. SHAW: This will be very prejudicial to the claim of churning by plaintiff Newburger, Loeb. There has been the assertionthis is a basis claim. It is far from being a basis claim. It might be a claimover which attorneys could disagree but it is not a baseless claim. Evidently because of the fact the churning claim does have merit what he is trying to do is pin his conspiracy on another alleged baseless claim. It will be prejudicial. No proof any people I represented had anything to do with the California action.

MR. MANDEL: I am going to show that some of thes defenants admitted they knew this action was going to be brought in California by Kayne, before it was brought was discussed by him. We are going to show on January 15th, you remember Persky said he left my office, he went right downstairs. Sloane the other plaintiff, called up -- you remember Persky said he called.

THE COURT: Did Persky represent Sloane and Kayne?

MR. MANDEL: He did.

MR. GLATZER: Not on this action.

THE COURT: In the negotiations in New York he was their lawyer.

MR. GLATZER: Not according to Kayne and Sloane.

THE COURT: As far as the jury can find on the record we have so far.

MR. MANDEL: At this point Persky represented the corporation of which the people are the promoters.

MR. GLATZER: The corporation didn't sue.

MR. SHAW: Do you represent Persky represented Kayne and Sloane in that proceeding?

THE COURT: He doesn't say that. He represented them in the negotiations in New York. This was the situation where he was going to get paid if the deal wen through. So to that purpose he didn't represent them in New York.

We had testimony about half an hour ago that Persky said to this witness you don't think Charley and Mabel will get their money without a fight if this deal goes through without their consent..

MR. SHAW: Totally unrelated action involving another attorney.

THE COURT: Isn't that a jury question, as to whether this is an unrelated lawsuit?

MR. MANDEL: There will even be more connecting testimony by Sloane who was one of the plaintiffs here, got the call from Persky and immedately called Gross in my office and said that if you don't let these deals go through you are going to be sued for the rest of your life.

MR. SHAW: What is the connection?

MR. MANDEL: Persky and others say they knew this was coming in.

MR. GRUTMAN: They never said that. That's a lie.

MR. BJORK: Your recollection is poor.

THE COURT: Mr. Mandel, do you represent to me Mr. Gross is going to testify that Sloane threatened him with a lawsuit?

MR.MANDEL: Right.

MR. SHAW: This lawsuit, the California action?

MR. MANDEL: He said you will be sued for the rest of your life.

MR. SHAW: No connection with this lawsuit and this conspiracy.

THE COURT: That's the question whether it is a private lawsuit or not. That is a jury question.

MR. GLATZER: The rights asserted by Mr. Kayne and Mr. Sloane in this lawsuit did not affect Mr. Sloane getting his money out of the partnership and they could have recovered and that was the beginning and end and they lost.

MR. SHAW: Where a person says you are going to have lawsuits for the rest of your life, every single lawsuit against Gross in any way involving these people, even though different lawyers, different disputes, could be proven and we are going to litigate the merits of all these lawsuits.

MR. GLATZER: This went on for 28 sessions at the Stock Exchange.

MR. MANDEL: Tha was the kind of harassment they put this poor man through.

MR. SHAW: Do you know what issues we are going to get involved here? I read the transcript, that New York Stock Exchange proceeding, it was a fraud action brought against Mr. Gross. One of the issues is whether Gross defrauded Sloane and Kayne into becoming partners. One of the issues is going to be whether or not the firm was under restrictions at the time, what the financial condition of Newburger, Loeb was, whether there was disclosure or fraud and misrepresentation by Gross to Sloane and Kayne with respect to this particular matter.

Now, if Mr. Mandel wants to bring that out I will bring out the other side of the story about all this fraud.

THE COURT: On the other side of this thing youhave four lawsuits you are going to try here. One is this trading account, one is the lease. Those are allegations of one kind and the question is, Mr. Mandel is saying those are fraudulently asserted. You say they are asserted in good faith and they are going to be litigated.

MR. BJORK: There is not a word about that in this pleading. It goes on for 90 paragraphs.

MR. MANDEL: This is Mr. Grutman's opening "Kayne was euchered by Mr. Gross into making an investment in Newburger, Loeb and becoming a partner."

MR. GRUTMAN: Where is the mention of the lawsuit?

MR. MANDEL: That is not in the pleadings.

MR. BJORK: He discusses a statement he made to the partners in which Mr. Kayne expressed that.

THE COURT: Gentlemen, we are at twenty after four. Have you got about 15 or 20 minutes of other things for Mr. Silverman by skirting this?

MR. MANDEL: This is the end with Mr. Silverman, these cases and the results of what happened in this litigation and arbitration.

MR. SHAW: We wouldn't be bound by those results.

MR. BIEHL: It is far more prejudicial than even the extended pleadings.

MR. MANDEL: Our conspiracy is they said

they are going to hound him with litigation and they did it.

THE COURT: I don't understand plaintiffs and additional defendants here in saying that this isn't within the language of Paragraph 64 because it certainly is. It does, I agree, open up enormous doors which is what troubles me.

MR. BJORK: Is he going to allege the suits by the landlords against Mr. Gross? There are any numbers.

MR. MANDEL: We have to connect it.

THE COURT: Everybody is talking at once.

MR. GLATZER: There was a claim for malicious prosecution and that claim was lost. I don't know how he can open the door and close it at the same time.

MR. MANDEL: The counterclaim for legal fees.

MR. GLATZER: For harassment it says.

THE COURT: Why don't we start your cross examination of this man and go for about a half hour? I will reserve decision on this issue overnight.

MR. GRUTMAN: Other than that are you through?

MR. MANDEL: Yes.

THE COURT: All right.

MR. MANDEL: We are still awaiting the report from the corporation.

THE COURT: Let's use our jury time first.

(In open court.)

THE COURT: Except for that one matter you have completed your examination?

MR. MANDEL: Yes.

CROSS EXAMINATION

BY MR. SHAW:

Q How long has Golenbock & Barell been the attorney for Charles Gross?

A I have no personal knowledge of that. However, in response to a similar question at my examination before trial I undertook to find out the first time Golenbock & Barell ever did any work for Charles Gross and I did find a document indicating that it was in either 1959 or 1960.

Q And did Golenbock & Barell continue to represent Charles Gross after either 1959 and 1960?

A Again I have no personal knoweldge but I make the assumption that it did.

Q And did Golenbock & Barell continue to represent Charles Gross as well as Gross & Company through the period up through 168?

A I don't know because I didn't come to the firm until May of '68 but I assume so.

A And did Golenbock & Barell represent Charles Gross as general counsel of Gross & Co.?

A I am prepared to make that assumption but I don't know.

Q And Golenbock & Barell continued to represent Charles Gross during the period when he was managing the partner of Newburger, Loeb; is that correct?

A No, that is not correct because I have searched to see whether we had any open engagements for Charles Gross fromJuly or so of 1969 until Charles Gross withdrew from the partnership and I don't see any indication of open engagements.

Now, you use thephrase did we continue to represent? While I see no open engagements I suppose from a layman's point of view it coulc be said Golenbock & Barell were the attorneys for Charles Gross, although there apparently were no pending matters during that period of time.

Q And did Golenbock & Barell represent Charles Gross after he gave his notice of withdrawal to the partners of Newburger, Loeb?

A No, not until February 8th or 9th, 1971, in connection with the matter as to which I am not testifying yet.

Q After Charles Gross gave his notice of withdrawal to the partners of Newburger, Loeb, did Charles Gross consult with Golenbock & Barell or any partner or associate with respect to Newburger, Loeb?

A As far as I know, not in respect of his interest in Newburger, Loeb.

Q But he consulted with respect to Newburger, Loeb in general, did he not?

A No.

Q Well, were there any consultations between Gross, Charles Gross and Golenbock & Barell about Newburger, Loeb or the business of Newburger, Loeb after he withdrew?

A If the question could be repeated, please.

(Question read.)

A What troubles me is the word "consultations".

Q Meetings with attorneys to discuss legal matters.

A No. On behalf of Jeanne Donoghue.

Q Are you saying that after --

A And not to discuss legal matters.

Q After Charles Gross withdrew as general partner of Newburger & Loeb did he have meetings with you to discuss Jeanne Donoghue?

A Yes.

Q And to discuss Mabel Bleich?

A No.

Q And to discuss his own personal affairs?

A No.

Q Who at Golenbock & Barell represented or did the work personally or did the legal work for Charles Gross besides yourself?

A Well, I didn't do any work for Charles Gross. As to anybody else I would have to have some indication of time frame.

Q In addition to Mr. Leonard Wagman and yourself, who at the firm of Golenbock & Barell did work for either Gross & Co. or Newburger, Loeb or Charles Gross?

A Let's take -- as for Gross & Company, I don't know. I came to the firm in May of '68 and I didn't have contact with Newburger, Loeb or with Charles Gross until August or so of '69. So I don't know who did the work for Gross & Company.

Q Do you khow if it was Mr. Barell himself?

A What was that?

Q Mr. Barell himself.

A I didn't hear the beginning of the question.

Q Do you know if the attorney who did the work for Gross & Company was Mr. Barell?

A I had no idea who did the work for Gross & Company.

Q Do you know if he ever did the work himself?

A I don't know.

With respect to Newburger, Loeb, several people worked for that client from July or so, '69 -- even before July. There was a partnership agreement drafted. I know some of the people that worked for that client and I could name those that I know.

Q How many where there?

A At one point or another probably half the firm did some work for Newburger, Loeb.

Q And who was the principal attorney in charge that did work for Newburger, Loeb?

A I know what you are driving at. The question wouldn't bring out the answer. The senior most attorney having to do with Newburger, Loeb was Justice Golenbock. The next senior attorney in the general business area was a Donald Shack, who is a partner of the firm. Then the partner in the litigation department was Leonard Wagman.

Q Did there come a time when you began to do most of the work for Charles Gross or Mabel Bleich?

MR. MANDEL: Object to the form of the question.

THE COURT: Sustained.

Q Did there come a time when you began to do most of the work for Mr. Gross?

A No. I represented Mr. Gross from February 8th, 1971 onward in connection with one matter. I never did any work for him except for that.

Q Except for that one matter?

A Yes.

Q Do you represent Mr. Gross right now?

A Yes, we do, in connection with certain litigation.

Q I didn't ask you what it is in connection with.

Now, did there come a time to your knowledge when Mr. Gross discussed with you the fact that he was going to give notice of withdrawal to Newburger, Loeb and Company?

A No.

Q Did there come a time whenMr. Gross advised you that he had given such notice?

A I learned at some point, and I am having trouble with whether he advised me, whether I learned it from him. Yes, I did learn it from him.

Q Now, did he come to your office and tell you this?

A No.

Q Over the telephone?

A I learned it when I called him about a matter.

Q All right.

Did there come a time when Mr. Gross --

A Wait. I am confusing something. I learned in that telephone call he was no longer the managing partner.

Q You testified about that. There was a telephone conversation on August 13th?

THE COURT: Let him finish, Mr. Shaw.

A That was on August 13, 1970. I am not certain that I ever learned from Charles Gross, in the manner that you would state, that he advised me, that he had given notice of withdrawal from the firm. But I am certain that I knew the fact one way or another by December of 1971 -- 1970.

Q Can you recall if you were advised by any partner or associate at the firm that you are with that Mr. Gross had given notice of withdrawal?

A I may have been. I say I don't know how I learned that he had given notice of withdrawal.

Q Did you ever have any conversation with Mr. Gross about the withdrawal notice?

A No.

Q Not that you recall?

A No, I didn't.

Q Did you ever have any conversation with Mr. Gross in which he advised you in substance that he had given a notice of withdrawal to the partners at Newburger, Loeb so tha he could be treated as a general creditor?

A As a matter of fact he told me just the opposite.

Q What did he tell you?

A This was this connection with the preparation for trial in that specific matter that we undertook to --

Q I just asked you what he told you.

A He told me that he did not give notice of withdrawal for the purpose of putting himself in any favorable position.

Q And this was some time in 1971 that he told you this?

A This would have been some time probably during 1973 when I was preparing to cross examine some witnesses.

Q Now, when he told you this, that he had not withdrawn so he could get favorable treatment as a general creditor, can you recall what you told him?

A I dien't get that.

Q Does it refresh your recollection that in the course of this conversation you said in substance to Mr. Gross , "Did you withdraw so that you could get treatment as a general creditor," different from the treatment that would be given go the subordinated lenders, the limited partners and the general partners of Newburger, Loeb?

A No. Substance of our discussion was quite tothe contrary.

Q Were there any conversations to your knowledge before youhad this conversation with Mr. Gross in 1973 about his giving withdrawal notice to Newburger, Loeb?

A I mustmake the assumption that there were. I am making the assumption that I had discussions about this with Charles Gross at any time subsequent to February 8th of 1971.

Q Did you and he discuss the pros and cons, the advantages and disadvantages of his withdrawing as a general partner of Newburger, Loeb?

A No.

Q Were you present at meetings when you heard Mr. Mandel discuss the fact that Mr. Gross had withdrawn and was therefore a general creditor?

A I believe so.

Q Were these meetings in January?

A That would be the meeting of February 5th.

Q Of 1971?

A '71.

Q At these meetings were representatives of the other general partners and limited partners and subordinated lenders present?

A Yes.

Q At these meetings did the subordinated lenders by their attorney or in their own behalf say in substance that if there was a liquidation, they would not be fully paid the amounts that they were owed?

A Well, I heard that statement made by various people as far back as the first meeting I attended on December 10th.

Q It was said many times; correct?

A It was said principally back in December.

Q By Mr. Steefel among other persons?

A By Mr. Steefel, by Mr. Risher, by Mr. Muh.

Q And were you present at meetings where the limited partners said either by attorneys or in person that if there were a liquidation the limited partners would not be paid anything either?

A That was said on December 10th.

Q And were you present at the meetings --

A That was an absolutely erroneous statement but it was said.

Q By whom was it said, sir?

A Said by either Mr. Risher or Mr. Muh.

Q Was it said by Mr. Bialkin?

A No, Mr. Bialkin as a matter of fact said at the meeting on December 30th that it was his belief that if there were a liquidation, the subordinated lenders would come out whole.

Q The question is the limited partners.

Did Mr. Bialkin say that the limited partners might get a little but but would not get out whole?

A I doubt that. I don't think so.

Q Did anybody say that?

MR. MANDEL: I don't object unless this is offere for the truth of the fact. I don't mind going into what was said but it s hardly proof that what was said was true.

THE COURT: I assume it is being offered only on that basis, Mr. Shaw.

MR. SHAW: Correct.

THE COURT: It is only being offered, ladies and gentlemen, on the fact that these words were spoken not that the underlying facts were necessarily true.

Q Wasn't the concensus that the limited

partners would not be paid on liquidation?

A Yes, that was the concensus.

Q Was it the concensus that the general partners would not get anything at all; in fact, they might be liable to creditors if there were a liquidation?

A Yes.

Q But Mr. Gross' position was that he was a general creditor; correct?

A That's correct.

Q Now --

A That he was a creditor. But the word general in there. I don't know about that.

Q In toher words, he was not in the status of a subordinated lender; correct?

A I am not certain about that.

Q Did he say he was in the status of a subordinated lender?

A He may well have been that he was and he said he was.

Q Pardon me?

A He had withdrawn and the partnership agreement said he ceased to be a partner for all purposes. It could well be argued from that partnership agreement he was in the status of a senior subordinated lender.

Q I think you said at one of these meetings Mr. Mandel went outside; correct?

A When you say did Mr. Gross say, I am answering it such that if Mr. Mandel said that Mr.Gross wanted it, it was the same as Mr. Gross saying it. That's why I hesitated.

Q At one of these meetings Mr. Mandel went outside and then came back in; correct?

A Yes.

Q And right after that i believe your testimony is that Mr. Steefel said something?

A Yes.

Q And what did Mr. Steefel say?

A It was so colorful you couldn't have missed it. He said that he thought that Charles Gross was a pig, which was very interesting coming from Steefel.

Q What had been said by Mr. Mandel right before Mr. Steefel said that?

A Mr. Mandel told the assembled group what it was that Charles Gross wanted, which very interestingly --

THE COURT: Please.

Q What did he say, please?

THE COURT: What did he say without characterization?

THE WITNESS: He said that Charles Gross wanted limited partnership securities in the new organization; that they, I believe, would come to terms as to how much because there was a dispute as to how much was owed to Charles Gross, that he wanted some cash andthat he wanted to be assured that he would not be violating Rule 318 of the Rules of the Board of Governors of the New York Stock Exchange if he accepted securities in the successor coproration, Newburger, Loeb & Company, Inc., and at the same time went to work for another brokerage house. Tht rule says that you can't hold securities in one brokerage house and work for another one.

Q Did he say anything else?

A If I could look at my notes of the meeting I could tell you. But I think that's pretty much what was said.

Q Did he mention or can you recall what he said regarding cash?

A I think he said he wanted $25,000 in cash. It was assumed that Jeanne Donoghue would in addition be paid out for $75,000.

Q How about Mabel Bleich?

A No, she would go along.

Q So there was going to be a total payment of

$100,000?

A To Gross $25,000.

Q And to Mabel Bleich 75,000?

A No.

Q Jeanne Donoghue $75,000?

A Right.

Q Mabel Bleich was to receive nothing?

THE WITNESS: Your Honor, Mr. Shaw keeps cutting off my answers.

THE COURT: Go ahead, finish your answer.

A The willingness to pay Jeanne Donoghue out had been expressed way back.

Q The question is what was said at this particular meeting, sir?

A I told you.

Q Now, you say that Mr. Mandel also indicated that he wanted a limited partner securities? In other words, he wanted shares in the corporation such as the limited partners were receiving?

A He was willing to accept that in an amount to be determined.

Q Did he also say how much could subsequently be decided and you could subsequently come to terms?

A I don't think so. I'd have to look at

my notes on that.

Q And did he say anything with respect to the fact that if anybody disputed how much he was entitled to receive, because he might owe the partnership money; that this could be determined subsequently?

A Well, I don't know whether this was premised on the exchange of releases. I suspect it was because if he were taking -- in fact I am sure it was because to have been taking this inferior type of security in the new organization, he was not at the same time suggesting that the promoters and the partners also be left with their rights to sue him forever and a day.

Q Now, at that meeting was there any conversation with respect to whether or not any other general partner was to receive any cash whatsoever?

A Yes. There was a discussion that no other general partner or withdrawn general partner was going to get cash.

Q And Mr. Gross' position was different from this in that he wanted $25,000 plus $75,000 to Jeanne Donoghue; correct?

A Mr. Gross took the position that he had legal rights and was entitled to enforce those rights. What other people wanted to do was not relevant to him, he said.

Q Did he say what he would do if he didn't receive the hundred thousand dollars plus the stock?

THE COURT: You mean unless his sister was taken care of, Mr. Shaw?

MR.SHAW: Yes.

A He would not consent to reorganization.

Q Did he say whatthis would cause?

A This would eventuate in litigation.

Q And would it eventuate in bankruptcy if there was no reorganization, was that discussed?

A In whose judgment, Charles Gross?

Q Was anything said to that effect? Did Mr. Gross or did his attorney, Mr. Mandel, say that if the result was bankruptcy, because there was no reorganization, so be it, or in substance?

A The word was liquidation. There is a great legal difference between the two. You may mean them synonymously.

THE COURT: Mr. Shaw, our reporter needs paper and we are just about at the end of the day. Is this a good point to stop?

MR.SHAW: Yes, it is, your Honor.

MR. GRUTMAN: May we have a copy of Defendants' QQ overnight?

MR. GLATZER: Perhaps the demand might be in the exhibits. It just occurred to me.

MR. MANDEL: Actually what happened is a litigation was started in California in the federal court. Part of it was dismissed on jurisdictional grounds, part was referred to arbitration by the New York Stock Exchange.

MR. GLATZER: I have it coming down very shortly.

THE COURT: Then I will hold up on this issue. Let me give back to you that which I got from them.

(In open court.)

ARTHUR SILVERMAN resumed.

MR. SHAW: Your Honor, just one small matter. You asked me to make available to Mr. Mandel records relating to the bills rendered by Finley, Kumble and I have marked as Plaintiffs' Exhibit 120 for identification a document on that point which I am handing to Mr. Mandel.

MR. GRUTMAN: I understand on that point the only open question is what is the amount of compensation to Finley, Kumble which was contingent or what was open.

That related to the corporate reorganization which, in the event the deal did not close, would not result in fees being paid for those services. Your Honor will recall Mr. Persky testified that we were paid for such services we performed as we went along, but there was some understanding as to the transfer agreement: in the event that did not result in a consummated deal all the firm would be paid would be its disbursements and would forfeit or do without the fees we had earned.

I therefore object to this document, which contains a considerable amount of information about other services which were paid for and which were not contingent, being admitted into evidence.

THE COURT: We will cross that bridge at such time as we reach it.

Go ahead, Mr. Shaw.

CROSS EXAMINATION CONTINUED

BY MR. SHAW:

Q Mr. Silverman, yesterday you advised us that you and your firm still to this day are the attorneys for Charles Gross; correct?

A I stated that from February 8, 1971 until the present time we have been representing Charles

A I have no idea.

Q Now, I believe that you testified that Golenbock & Barell became the attorneys for Neuburger, Loeb some time in September of 1969, is that correct?

A General counsel to Neuburger, Loeb in August or September, but we did some work for Neuburger, Loeb earlier in '69.

Q Was that in May of '69?

A Well, I think that there was some work done for Neuburger, Loeb in the beginning of 1969. I have no personal knowledge of that work but I base that on some records that I have reviewed.

Q To your knowledge, was that the first time Golenbock & Barell had done any work for Neuburger, Loeb, some time in early 1969?

A As far as I know. As I say, the services in the beginning of 1969 are really not in my knowledge either. What I have testified to is based upon records that I have reviewed.

Q And when did Charles Gross become a general partner of Neuburger, Loeb? Was that early 1969?

A I was informed that it was January 2nd of 1969.

Q Did the fact that Charles Gross became a general partner of Neuberger, Loeb in early 1969 and the fact that Golenbock & Barell began to work for Neuburger, Loeb in early 1969 have anything to do with one another?

A I don't know. I have made the assumption that it did, but I don't know.

Q And is that assumption an assumption that Charles Gross introduced Golenbock & Barell to Neuburger, Loeb as a client?

A No.

Q Well, do you assume that it was through this connection with Charles Gross that Golenbock & Barell acquired Neuburger, Loeb as a client?

A I have made that assumption. I have no personal knowledge.

Q And you still have that assumption as of this moment?

A Somewhat modified.

Q Now --

A I have reviewed minutes of Neuburger, Loeb's executive committee wherein I learned that several law firms were interviewed by the executive committee and Golenbock & Barell was chosen by the executive committee, on which at that time there were five members, Leo Stern, Robert Stern, Andy and Bob Neuburger and Charles Gross.

Q Did Golenbock & Barell replace another law firm as counsel for Neuburger, Loeb?

A I don't know that Neuburger, Loeb had a firm as counsel. They had a lawyer that did some work for them, but I don't know that Osmond Frankel, who was an individual practitioner, was, as we know it today, a general counsel He may have been but I don't know.

Q When Golenbock & Barell first began to do work for Neuburger, Loeb did you become active in that work or was that handled by somebody else?

A No. The first work that was done by Neuburger, Loeb I didn't even know about until fairly recently.

I became -- I don't want to use the word "active," because my activity started at a low point and began to build up. My first involvement with Neuburger, Loeb was some time in August or thereabouts of 1969, and by the end of December I was involved in litigation matters.

Q Now, when an attorney becomes involved in one aspect of a client's problems is it usual for him the case?

A About the merits of the case? It was just an assumption the Buckleys owed the money. So if you call that merits, I guess that's merits.

Q Did Mr. Ryan tell you the Buckleys owed the money or did Mr. Ryan tell you the Buckleys wanted to be able to settle the case because they would go bankrupt?

All you could get anyway in bankruptcy was a small sum and would you settle for $25,000, which is about the size of the legal fees they would have to spend if they contested the matter?

A That's not what he said. You have a habit of putting all these statements of fact in your questions and most of them are wrong.

Q Let me ask you this question: did Mr. Ryan tell you that he felt that a good resolution to the matter would be the filing of a bankruptcy petition by Mr. Buckley?

A You say a good resolution?

Q Yes.

A No. He said that Buckley, Sr. would pay something to keep his son and daughter-in-law from that embarrassment.

Q Did he tell you that if it didn't get settled, if the case didn't get settled, and if Neuburger, Loeb pressed the Buckleys, they would file a bankruptcy petition?

A Oh, yes. He had been saying that all along.

Q Did he say anything to the effect that this made sense to the Buckleys in doing this because the legal fees involved in fighting this case would be enormous?

A No. Never made that statement.

Q Now, did Mr. Ryan ever mention the fact that in his opinion the Buckley account had been fraudulently mismanaged?

A Mr. who, Mr. Ryan?

Q Yes.

A No.

Q No? Did you say no?

A Will you let me answer?

Q Go ahead.

A The first time that I learned about claims was somewhere in the period March 27th to April 16th, when I learned --

Q Which is before the arbitration --

THE COURT: Let him answer, Mr. Shaw.

A When I was told there were large 10b-5 claims That's all I was told.

Q Who told you that?

A Mr. Ryan or Mr. Holtzschue, I don't recall.

Q Is it possible that both told you this, is that your recollection, that Mr. Holtzschue told you this and Mr. Ryan told you this?

A One or the other.

Q But you don't know which one it was?

A I don't recall which one. If I had to pick between the two I would say Mr. Holtzschue.

Q That's a guess, isn't it?

A Well, I don't know where something begins to be a guess and something begins to be a vague recollection but it was one or the other.

Q Wasn't this well prior to the time the arbitration had been commenced through the filing and the service of the demand for arbitration? Didn't that occur some time in June of 1970, about three months later?

A Three and a half months later. It was filed on July 13th and this conversation was somewhere in the period March 17th to April 16th.

Q 10b-5, is that churning?

A 10b-5 is label given to a whole class of things.

Q Including churning, right?

A It includes churning.

Q Does 10b-5 mean churning to you?

A No.

Q What does it mean, fraudulent mismanagement of a customer's brokerage account; is that 10b-5?

THE COURT: Mr. Shaw --

MR. SHAW: Withdrawn, your Honor.

A It doesn't mean that.

Q Where there is a dispute over whether a customer owes money to a brokerage firm and the attorney representing the customer says 10b-5, does that convey to you right now churning of the customer's account?

A No.

Q Does that convey to you right now fraudulent statements made to the customer by the customer s [illegible]an?

A A possibility. There are a variety of other possibilities.

Q All right. As of this point, when Mr. Holtzschue first mentioned 10b-5, had you spoken with Mr. Jordon?

A No.

Q Had you spoken with Mr. Buckley?

A No.

Q Had you spoken with Mr. Gross?

A No.

Q You had just spoken with Mr. Leo Stern and Mr. Miles, is that right?

A I had spoken to Mr. Ryan something about the Buckley case.

Q When did you first learn that Gross & Company had been the originating broker withregard to the Buckley account?

A The meeting that I had at Neuburger, Loeb, which was either the 15th, 16th or 17th. I think the 16th.

Q Are you referring to a meeting you had with Mr. Goldstein and Mr. Miles and reviewed the contract to see if there was an arbitration clause?

A Yes.

Q Then for the first time you learned that Gross & Company had some time been ilvolved?

A First time I learned of Gross & Company, period.

Q At that point did you learn that Gross &

Company was Charles Gross?

A I learned that he was the principal partner. You make an equation: I don't know if I can do that.

Q At that time did you learn that Gross & Company was also Mabel Bleich?

A I don't.

Q At that point did you learn that Gross & Company was Charles Jordon?

A No. I learned that Charles Jordon worked for Gross & Company, but you make these equations that just can't be made.

Q At that point did you know that Golenbock & Barell had been representing Gross & Company since 1959?

A No. I don't know that's a fact either.

Q For a long time, correct?

A Intimately over a period of time, and I think you can say intimately over a decade.

Q Now, I believe that you testified that you drew the conclusion by virtue of the fact that Mr. Ryan or Mr. Holtzschue, or whoever it was who represented the Buckleys, hadn't said a word about churning, that there was no merit to the claim of churning; isn't that your a legal argument to me. To say will you shut off the arguemnt, even that I find distressing.

MR. GRUTMAN: I understand legal arguments are only appropriate before the court when --

THE COURT: There is a matter as to whether Regulation T is or is not a waste of time.

MR. SHAW: I do not intend to ask any more questions on Regulation T of this witness.

THE COURT: All right, Mr. Mandel, the argument is finished.

BY MR. SHAW:

Q Mr. Silverman, I think I would like to focus your attention on your interview of Mr. Jordon. Prior to the time you interviewed Mr. Jordon was it your view that there was no merit to the counterclaim charging churning and mismanagement and false statements.

A Yes.

Q And was it your view that you would interview Mr. Jordon just as a precautionary measure?

A No.

Q Was it your view that you would interview Mr. Jordon to see if there was merit to the counterclaim and offset charging churning and mismanagement?

A I would interview Mr. Jordon to try to ascertain all of the facts and I suppose one of the purposes of that interview would be to evaluate whether I was wrong in forming the view that there was no merit.

THE COURT: Mr. Shaw, would this be a good time for our recess?

MR. SHAW: Yes, your Honor.

THE COURT: We will take our midmorning recess.

(Recess.)

(In open court; jury not present.)

ARTHUR SILVERMAN resumed.

THE COURT: Let me ask counsel on what basis was this defense dismissed? Was it dismissed on the ground -- this defense of malice in the institution of the arbitration, was it dismissed on the merits or did they take testimony on it?

MR. BIEHL: They took testimony and dismissed on the merits.

MR. GLATZER: It says, "Adjudged that the counterclaim asserted by Gross against said arbitration be and hereby is dismissed."

MR. MANDEL: I think you ought to ask Mr. Silverman about that.

MR. GLATZER: You don't get the thinking

THE WITNESS: When you are hit with $2900 worth it is.

MR. GLATZER: I think there were 23 or 28 sessions.

THE COURT: Well, you are going to go on here for another half an hour, are you not, Mr. Shaw?

MR. SHAW: At least until 1 o'clock.

THE COURT: I'm beginning to get a good feel as to what's involved and I will reserve decision. I will decide firmly after the lunch.

Bring in the jury.

MR. GLATZER: It might be good to have that portion of the summation read in which the claims were discussed.

MR. BIEHL: Mr. Silverman read from that.

(Jury present.)

MR. SHAW: May I proceed, your Honor.

THE COURT: Please do.

CROSS EXAMINATION CONTINUED

BY MR. SHAW:

MR. SHAW: May I proceed, your Honor?

THE COURT: Please do.

Q Now, Mr. Silverman, we were at the point where you were just about to tell us of your interview with Mr. Jordon. Will you tell us where that interview took place?

A It took place on the premises of Neuburger, Loeb & Co., and I believe that it was in the office which either was or had formerly been occupied by Charles Gross. It was the end office on the right side as you come down the hall.

Q Now, who was present -- Mr. Gross? Was he present?

A He was.

Q You had asked him to come along, correct?

A Yes.

Q Was Mr. Miles present?

A He was.

Q Was anybody else besides Mr. Jordon present?

A And myself.

Q Now, prior to this time had Mr. Gross withdrawn as the managing partner of Neuburger, Loeb?

A He stepped down as managing partner.

Q He stepped down on August 11, 1970, did he not?

A That's what I later learned.

Q This interview was on September 15, 1970?

A Correct.

Q Prior to September 15, 1970, in addition to stepping down from being the managing partner, had Mr. Gross also given some sort of notice to Neuburger, Loeb?

A Yes. He said so much abuse had been heaped on him that he withdrew from the firm.

Q So much abuse had been heaped upon him that he had withdrawn from the firm?

A That's correct.

Q He withdrew from the firm on August 11th, correct?

A No. As far as I know, he did not.

Q He stepped down on August 11th?

A As managing partner.

Q When did he give notice that he was withdrawing from the firm?

A I was informed he gave notice I think at the end of August, effective the end of September.

Q So on September 15th Mr. Gross no longer was either the managing partner or a full general partner; he was a partner in the processing of going out, correct?

Gross might give you some information and participate in the questioning and help it go along, this interview?

A No, sir.

Q Did Mr. Gross ask any questions of Mr. Jordon?

A No.

Q Did he participate in any way?

A Well, in the beginning he participated in making introductions.

Q That's all he did?

A He did not participate during the meeting.

Q Are you sure about that?

A Yes, sir.

Q Did he suggest any questions to be asked?

A No, sir.

Q By the way, when was the last time you saw the notes which you took on September 15, 1970 of this interview?

A Soon after I took them, after they had been transcribed, typed.

Q And you hadn't seen those notes in five years?

A No, sir.

Q And you haven't seen any copies of the notes?

A No.

Q When you transcribed notes of the interview did you make a copy of the notes available to Mr. Miles?

A No.

Q Did you make a copy available to Mr. Gross?

A No.

Q How about Mr. Jordon?

A No.

Q Just one copy was made?

A My handwritten copy?

Q No, the transcribed version of the notes.

A Just typed.

Q Obviously one copy, is that correct?

A That's correct.

Q That copy you say was given to Mr. Berkowitz?

A I say it's my best belief that it was in the file together with all the other papers when it was turned over to Mr. Berkowitz.

Q Now --

A I also testified -- I didn't finish. I said I also testified that I could not say that each individual paper of classes of papers that were supposed to be in the file were in fact in the file. I have no recollection of each particular piece of paper.

Q When you turned the file over to Mr. Berkowitz did you obtain a receipt?

A No.

Q And before turning the file over to Mr. Berkowitz are you the one who took certain of the memoranda out?

A I took out intraoffice memoranda.

Q So you reviewed the file to do that, did you not?

A That is correct.

Q Can you recall in the course of reviewing the file you saw the notes of the interview with Jordon on Sepgember 15, 1970?

A I can't recall one way or the other.

Q Is your recollection clear with respect to what Jordon said on this occasion?

A Some things are very clear, some things are not.

For example, one thing has come to my mind over the past weekend that I never recalled before.

Q And I believe you have indicated that you have difficulty recalling conversations which took

A There is always the possibility you learn something in an interview and I wanted to be absolutely what Mr. Jordon had to say primarily on the question of control.

Q You were absolutely sure, based upon what Jordon told you, correct?

A There can always be a miscarriage of justice. So you can never be absolutely sure. You know that, I know, and every litigator at the tables knows that.

Q You can never be sure of the truth of those statements, correct?

A Absolutely sure, no. But we were pretty sure, based upon our interview with him, that he was an honest person; honest with us, at least.

Q As of this point, September 15, 1970, were you aware of the fact that various persons in Neuburger, Loeb were asserting or stating that they had claims or wanted to bring claims against Mr. Gross?

A At the time of September 15th I was not so aware.

Q Well, you became aware of that shortly thereafter, didn't you?

A No.

Q You said that Mr. Gross had withdrawn because of all the abuse that was being heaped upon him, correct?

A I later learned that fact, yes. I didn't know it then.

Q Did you learn that as of September 15th various people at Neuburger, Loeb were beginning to raise claims against Mr. Gross?

A At what point did I learn this?

Q I don't care when you learned it but as of that date, September 15th, weren't claims beginning to be asserted against Mr. Gross?

A There were people who were stating that Charles Gross had done certain things that were not to the benefit of the partnership.

Now, making claims, I take that to mean in a formal sort of way. I later learned there was a lengthy speech that Fred Kayne had given that was taken down by a court reporter in which he began to point the finger toward Charles Gross, in my judgment as a scapegoat.

Q As of this point your law firm represented Neuburger, Loeb & Co.?

A Yes, on certain matters. On other matters we did not.

As of this point on many other matters Finley, Kumble was representing them.

Q As of this point your law firm also represented Charles Gross?

A No, sir.

Q Didn't you indicate that during this period, although there were no open matters, that you considered that your firm represented Charles Gross as well as Neuburger, Loeb?

A I said in a layman sort of way. However, I in fact checked the files of the firm and I can't find we did anything for Charles Gross over and extended period of time,which included 1969 and '70.

To the extent you asked a person who is your lawyer may have just drafted a will, then you say my lawyers are Golenbock & Barell. In that way we are their lawyer.

Q You had a relationship with him, did you not?

A The firm did, yes.

Q Subsequent to the interview with Jordan I believe you testified that you discussed the possibility of a claim-over against Gross & Co..

A Correct.

Q If such a claim-over had been made could

Golenbock & Barell have made it?

A In my judgment, yes. We might have chosen not to make it but you asked me as a question of professional ethics could it and the answer is yes.

Q Even though it was suing a person who had formerly been its client?

A That is correct.

Q Wouldn't Golenbock & Barell have been reluctant to do that?

A I assume so, although at the time I must say I had no reason -- I did not know of the prior relationship between Golenbock & Barell and Mr. Gross and at that time it hadn't entered my mind.

It may have been if a recommendation were reached to proceed on a claim-over against Gross & Co. we would have withdrawn from the case. It was something that came to me at a later time about the relationship. At that time I didn't know of any.

Q Now, you made a recommendation to Mr. Miles, correct, that there be a claim-over?

A No, I didn't make a recommendation. I said Neuburger, Loeb had the right to claim over.

Q Against whom, Gross & Company?

A Yes, and against Jordon.

Q As well as Bleich and Donoghue?

A I didn't know the names Bliech and Donoghue at all until December 9, 1970. I never heard those names.

Q Now, in saying that did you also say anything to the effect that although it had the right to make this claim-over, it should not do so for tactical reasons?

A That was a recommendation.

Q In other words, your recommendation was make a crossclaim against Gross & Company but it is not a good idea?

A Yes. It was my view that it would dignify a meritless claim.

Q I believe you indicated on August 11th Mr. Gross withdrew as managing partner and thereafter withdrew as partner. Had Golenbock & Barell represented Charles Gross or been familiar with the proceedings pending prior to August 11th involving Neuburger, Loeb before the New York Stock Exchange?

A Well, I was not and I have to assume that the firm was. I was not at that time.

Q And are you at all --

A Are you talking about the firm's censure?

Q I'm talking about the $50,000 fine and censure.

A The firm I think was familiar with it; I wasn't.

Q Are you aware of the fact that there was a censure imposed on or about August 11, 1970?

THE WITNESS: Your Honor, may I check some records on that?

THE COURT: Sure.

THE WITNESS: Because I don't know that the date is accurate.

(Pause.)

A The date is inaccurate.

MR. GRUTMAN: Can we have the date?

THE WITNESS: My records indicate July 23, 1970.

THE COURT: Aren't we getting into a different subject?

MR. SHAW: Yes, we are, your Honor.

THE COURT: Let's recess for lunch. Five minutes after 2, please.

(The jury left the courtroom.)

THE COURT: Now, let me ascertain just one further fact on this complaint. Does the award of the arbitrators, decision of the arbitrators, contain any mention of the disposition of this defense?

MR. GLATZER: In the actual award itself?

THE COURT: Yes, the arbitrators' decision.

MR. MANDEL: You have to ask Mr. Silverman.

THE WITNESS: My recollection is no.

MR. SHAW: I think we should have the award, your Honor.

THE COURT: I have the confirmation.

THE WITNESS: I gave the award to somebody this morning.

MR. MANDEL: We have it here (handing).

THE COURT: Well, inasmuch as the arbitrators, in their decision of May 7, 1974, did not pass upon this defense, and inasmuch as they dismissed the claims of Sloane and Kayne in the statement of claim, and inasmuch as the counterclaim of the respondent, which is dismissed, I gather was a claim for attorneys' fees and costs in getting the lawsuit into arbitration, or in connection with the arbitration -- is that correct?

THE WITNESS: That's correct.

THE COURT: -- it would appear this issue had not been passed upon by the arbitrators and therefore I don't see that anything they did affects this court.

Consequently, the reasons I had earlier given that cause me to believe that the jury should properly consider this action in the context that the Gross defendants should be considered I shall alow and I will therefore permit the complaint to go in evidence.

I seem to have taken my copy upstairs. Is that the only copy in the courthouse?

THE WITNESS: I have a copy, your Honor. I have a copy, yes.

MR. BIEHL: In light of your Honor's decision, do you limit the questioning to the fact of the complaint having been drawn to the fact that there was an arbitration and not allow examination into the underlying facts of that so we wouldn't have a retrial within a trial?

THE COURT: Let's put it this way: I fear you may find disagreement on the part of the counsel with your desire.

On the other hand, I am desirous as possible of not going any farther in examination than is necessary for all parties to have fairly presented the issues. So to the extent the examination can be limited, I am all for it. On the other hand, there may be areas of examination that counsel feel are legitimate and I would have to pass on that as we come to it.

MR. GRUTMAN: Manifestly, your Honor, the determination by the arbitrators is not a fact that is to be made known to the jury in this case.

THE COURT: Not on the present state of the record. All that is before me is whether that complaint should go in the evidence as being the complaint that Sloane and Kayne filed in California in 1971, that's all I'm ruling on is that single fact.

MR. GRUTMAN: Thank you, your Honor.

(Luncheon recess.)

Q Did you indicate to me that you were willing to cooperate with Mr. Mandel but not with me.

A No, I did not.

Q Did I call you on another occasion and renew the request I had made asking to see you on the basis of the fact that you were predecessor counsel for a client that we had in common? Do you remember such a conversation?

A You did not call me but you asked me here in the courtroom that same question and I think you are mistaken as to whether it was a phone call. It was a personal request.

Q You say you only had one telephone conversation?

A I now only recall, there was only one.

Q In other words, Mr. Silverman, I am in error and you are correct?

A On this particular point, yes.

Q Mr. Silverman, is it also a fact that in addition to agreeing to meet with Mr. Mandel on behalf of Mr. Gross you personally have represented Charles Gross as lawyer?

A That is correct.

Q In litigation?

A Yes.

Q And is it also a fact that you and your firm are presently representing Mr. Gross in a number of litigations?

A That is correct.

Q And is it also a fact that your firm is representing Mr. Gross in a number of litigations, which relate to Mr. Gross' activities as a partner in Gross & Company?

A The question as phrased cannot be answered except to say no, that is not correct. By virtue of his being a partner, yes, but not in connection with his activities as a partner.

Q By virtue of his having been a partner in Neuburger, Loeb & Company, your firm is defending Mr. Gross, is that correct?

A That's correct., on some landlord claims --

Q I didn't ask you what they were.

MR. MANDEL: I object to the interruption.

MR. GRUTMAN: That is not responsive to my question. I didn't ask the subject.

THE COURT: Go ahead.

Q Mr. Silverman, wherever possible just answer my question.

THE COURT: Mr. Grutman, do not lecture the witness. Just put questions.

Q Is it also a fact that in all of those representations your firm has represented Mr. Gross on a professional fee-for-services basis?

A Yes.

Q Is it the fact, Mr. Silverman, that you represented Mr. Gross before the New York Stock Exchange?

A Well, I'm confused by "before the New York Stock Exchange." We represented Mr. Gross in connection with a matter before the exchange and we represented him in connection with a matter before the Board of Arbitration of the Exchange. I don't know what you mean by exchange.

Q I mean just that.

A Both of them?

Q Yes.

Were there a number of hearings in that matter?

A It was the longest arbitration in the history of the New York Stock Exchange, 24 hearing days.

Q And would you tell me, Mr. Silverman, were the services you performed in that matter on a fee-for-services basis?

Q Was the bill submitted to Mr. Gross paid in full?

A No, it was not.

Q Was it substantially deferred?

A I don't know what that means but it hadn't been paid in full.

Q Does your firm have an understanding that out of any proceeds which Mr. Gross may derive from this litigation you expected the unpaid portion of your bill to be paid?

A No, sir.

Q Do you know whether or not other partners in the firm may have made such an arrangement with Mr. Gross?

A I have been present at every one of the meetings with Mr. Gross concerning fees.

THE COURT: The answer is?

THE WITNESS: The answer is our firm is not to be paid out of any proceeds received in any specific litigation.

Q Your firm does expect to be paid that portion of the bill not yet paid, is that correct?

A Darn right.

Q What's the amount of the unpaid balance of the bill, Mr. Silverman?

A I have that information specifically because I thought you would ask it.

MR. GRUTMAN: Your Honor, would you advise the witness to please just answer the question without musing.

THE COURT: He will answer.

Q What's the amount?

A I will give you the amount unpaid in connection with everything $47,500, unpaid as of this date.

Q Is that considered a substantial bill unpaid.

A Well, it's according to perspective. We have some bills that are quite a lot larger unpaid. I think it is substantial by my way of reckoning. That's a lot of money for me.

Q That's Charles' Gross' bill.

A Correct.

A No, that's not his bill. That's what's unpaid.

Q Unpaid. Besides Charles Gross your firm has represented Mabel Bleich and Jeanne Donoghue, is that correct?

A That's correct.

Q And was the representation of Mabel Bleich and Jeanne Donoghue at the suggestion or on the recommendation of Charles Gross?

A Yes. As far as I know I have no personal knowledge, but I am assuming that.

Q Now, do you know, Mr. Silverman, and if so please tell us, have you sent a bill to Mabel Bleich for the professional services rendered by your law firm to her from the time she became your client?

A We have not.

Q Have you sent a bill to Jeanne Donohue for the professional services which your firm rendered to her since your firm began representing her?

A We have not.

Q Have you billed either of those ladies for the disbursements, that is, out-of-pocket expenses which your firm incurred in connection with your representation of them?

A Yes.

Q Has it been paid?

A There is nothing open, so I am assuming it has been paid.

Q To whom did you send the bills?

A I believe the bills were sent to Jeanne Donoghue, care of Charles Gross.

Q What about Mabel Bleich's bill, did you send that to Charles Gross?

A That would be one bill.

Q Did you send Mabel Bleich's bill to Charles Gross

A That would be the same bill, yes.

Q Did Charles Gross pay the bill for Mabel Bleich?

A As far as I know, not, but I don't know who paid the bill.

Q Who paid the bill for Jeanne Donohue and Mabel Bleich if both paid?

A As far as I know, Jeanne and Mabel.

Q What's the basis of your knowledge as to what the course of the funds was, Mr. Silverman?

A I have no knowledge as to where the funds came from.

Q Therefore, you can't tell us under oath whether or not the funds came from Charles Gross now, can you?

A No, I cannot.

Q Would you tell me what the amount of the professional services rendered to Mabel Bleich and Jeanne

Donoghue outstanding at the present time is?

A I think it is $6800.

Q For each or both?

A For both.

Q And that amount has been outstanding for five years, sir?

A That's correct.

Q Have you sent statements to either of those clients whom you represented during the five years that that bill has been outstanding?

THE WITNESS: Your Honor, I object to the intonation of Mr. Grutman as to the word "clients."

Q They are your clients.

A As far as I know, statements have been sent.

Q Regularly?

A It's the practice of the bookkeeping department to send statements monthly.

Q And is it also the practice of your bookkeeping department, Mr. Silverman, to keep a running account open for five years without doing something more than sending periodic statements, unless you have an understanding with somebody else about paying the bill?

Q And when you were talking about law firms and you mentioned the Rosenman firm, you gave them an accolade of being a reputable and highly-regarde law firm; do you remember stating that?

A Yes.

Q Isn't it also true that the Webster, Sheffield firm is a highly reputable firm?

A Highly regarded.

Q Mayor Lindsy is a member of that firm?

A I think he is.

Q And was before he was mayor?

A Yes.

Q One of the named partners was the president of the Association of the Bar of the City of New York, right?

A That's Webster, I think.

Q Now, as a lawyer who has worked in this building are you not familiar with the practice which obtains between lawyers in civil as well as in criminal matters, where opposing lawyers will speak to the opposite party in the presence of their adversary?

A I wouldn't say that's a practice. It's done but it is not a practice.

Q Is it done among reputable law firms?

A I would say it is far from being the practice.

Q Did you ever ask anybody in the Webster, Sheffield firm --

A In fact, it's almost never done.

Q Did you ask anybody in the Webster, Sheffield firm if you could have the opportunity to participate in a conference with a member of that firm in the presence of Mr. Buckley to get what might be perhaps the other side of the story?

A I did not.

Q There did come a time when the Webster, Sheffield firm interposed churning claims and the set-offs which were part of the answer in the arbitration?

A One setoff, a churning counterclaim and a bad advice counterclaim.

Q Addressing my attention to the churning counterclaim, did you believe, Mr. Silverman, that when the highly reputable law firm, Webster, Sheffield, interposed in a formal answer to the arbitration demand a counterclaim for chrning, that such a counterclaim as that law firm interposed was a sham or a fraud?

A I think that that counterclaim was a frivolous counterclaim. I don't know that I could go as far as calling a sham and a fraud because I have seen a lot of reputable firms interpose a lot of counterclaims to avoid their clients having to pay something.

If I were a layman I might go so far as to say a sham and a fraud. As a lawyer I've seen it done too many times.

Q As a lawyer would you say it was a sham or a fraud?

A I say I can't divorce myself from my background as a lawyer and I've seen an awful lot of frivolous claims asserted by reputable law firms.

Q I take it the answer is no?

A What was the question again?

THE COURT: Don't take it the answer is anything. You have an answer. Put your next question, please.

MR. GRUTMAN: Yes, sir.

Q In lawsuits, Mr. Silverman, you know there are no second prizes; right. One side wins and one side loses; right?

A Well, most lawsuits are settled.

Q Those that go to the moment of truth, some body gets kicked in the head, there is no second place;

right?

A Generally one person wins or loses. Sometimes that doesn't even take place. When you have counterclaims and all that doesn't always work.

Q Wouldn't it be a fair thing to say as between the law firms that represent contending sides reasonable men can differ about questions of law, can they not?

A They sure do.

Q And do they not in almost every case?

A Every case that gets to trial is usually the result of different people differing in their interpretation of facts or law.

Q And the opinion which you drew about the merits of the churning claim just happened to disagree with the Webster, Sheffield firm?

A Not just happened to disagree, they were violently opposed to whatever it was they pleaded.

Q You were a lawyer with four years' experience at the time, six trials and no churning cases behind you; right?

A Yes.

Q And Mr. Ryan, who was the senior partner in charge, was a man who had been at the bar nearly four times as long as you; right?

A I have no idea but I'm willing to assume he had been at the bar many years longer than I.

Q You know he was an assistant United States attorney in 1966 in this courthouse?

THE COURT: This is inappropriate. This is argument. Sustained.

MR. GRUTMAN: Sustained.

Q Mr. Silverman, how good is your recollection?

A I have no idea. I suspect that my recollection -- what being a witness is all about, having been a litigator before, recollection, there are parts of it that are very clear, parts of it not so clear, and some things come to you at certain times. For example, certain things came to this past Sunday at home, certain things occurred to me at other times, you hear something, you read something. I don't know how good my recollection is.

Now, I don't know how good any witness I have to work with -- how good his recollection is either.

Q Tell me, Mr. Silverman, as a professional litigator, have you ever heard of the phrase "a conven-

A About the aspect dealing with the meetings in the fall of '70, I had discussion with Mr. Gross in the fall of '70.

Q That's involved in this matter, the lawsuit before Judge Owen and this jury?

A Yes.

Q Now, have you spoken to Charlie Gross?

A Not about the Buckley matter.

Q Wait until I finish my question, Mr. Witness.

Have you spoken to Charlie Gross about any of the issues involved in this case?

A The answer would be yes.

Q And do you think that perhaps your recollection has gotten slightly -- oh, gone askelter from what you would have recalled shortly after the events of 1970, '71 by reason of having been filtered through the recall of other people, such as Miles, Gross, Mandel?

A From Charlie Gross my recollection has not been refreshed at all.

Q How about from Miles?

A Mr. Miles, there were things that he said that refreshed my recollection.

Q I take it you read the opening statements of Mr. Mandel and myself in this case?

A I did.

Q Was that a matter of curiosity or for what purpose did you read the opening statements?

A Because I had been told that you in your opening statement had said unkind things and ungrateful things about the firm of Golenbock & Barell.

Q I said things I believe, Mr. Silverman --

THE COURT: Just put questions.

Q Did you read that to gird yourself for my cross examination of you when you would come on behalf of Golenbock & Barell?

A I have been in anticipating it. You have a fine reputation and I have been anticipating the cross examination.

Q Do you have Exhibit QQ, the one you prepared weeks ago?

A Yes.

Q You also have Exhibit RR, right?

A Wait a minute.

Q You have RR?

A I have RR and QQ.

Q First look at RR, if you would. Do you recall that portion of the exhibit which is below Mr.

Mandel's telephone number in 516 land, you told Judge Owen is something that you could not recall, that you had no recollection of is recorded on that document and you described that document to Judge Owen as your past recollection recorded. Do you remember telling us that less than 48 hours ago?

A Not quite accurate. I described that entry under the word Persky as past recollection recorded.

Q That purports to have a quotation in it attributed to Persky:

"He is willing at some point to stand and argue with Charles as to what is owed him."

A "As to what's owed him."

Q "Would not serve Charles' interest if the deal were blown. Several people would be looking for his head."

Absent that writing, you had no recollection of that entry or that conversation; is that what you told us?

A Well, I had a recollection of having a conversation with Persky on the day that Jeanne Donoghue -- that I was told by Charles Gross that Jeanne Donoghue had refused to go along with the deal. I had no recollection of the substance of that phone call.

is something that you wrote down on January 14, 1971, is that right?

A That's correct.

Q Exhibit QQ is a document which you prepared for yourself three weeks ago in 1975; right?

A Yes, and there are inaccuracies on it.

Q I didn't come to that again.

A I see one right away.

Q I didn't come to anything yet, Mr. Silverman. Don't anticipate me.

This document, QQ, was prepared for your purposes three weeks ago;right?

A Right.

Q And when you prepared that, Mr. Silverman, did you review or did you prepare it from the compilation of other documents and files that you have been using as you have testified here yesterday and today?

A Yes.

Q There is an entry there under date of February 5, 1972, and I invite your attention to the entry which reads as follows:

"ACS" -- Arthur C. Silverman -- "handed the complaint by Persky."

There then appears the following language within quotation marks:

"You don't think Mabel and Charles will get their money without a fight if the deal goes through without them"; correct?

A Correct.

Q Who said that, Mr. Silverman?

A Mr. Persky.

Q You have attributed that statement to Mr. Persky in quotation marks. That means you are purporting to set down, as you testified yesterday, precisely what Robert S. Persky said to you on that date, am I correct?

A Pretty close.

Q Not in quotation marks if it is in quotation marks?

THE COURT: Sustained.

Q Do you have a document dated February 5, 1971 which has been received in evidence and which contains that quotation which you gave us yesterday and attributed to the mouth of Robert S. Persky?

A No.

Q You don't. So then I take it, Mr. Silverman, that while you were compiling Exhibit QQ and sifting through all the files and papers that you have -- did that include the ones in here?

A Would you, please?

MR. GRUTMAN: The witness has brought to the witness stand --

THE WITNESS: It does not include those in there, but that's all right. I wish you would stand on the other side of the white line.

Q Sorry. I didn't mean to trespass.

From all the papers that you looked at, Mr. Silverman, you couldn't find one that has that language on it, correct?

A Wrong.

Q Show me the paper dated February 5th --

A That wasn't your question.

Q Mr. Silverman, my question was where is the paper dated February 5th.

THE COURT: Sustained. You commented earlier about Mr. Mandel making utterances of one kind or another. I make the same observation.

MR. GRUTMAN: I am reproached, your Honor.

THE COURT: Not reproached.

Q Show me the entry on January 5, 1971 where Mr. Persky said to you, "If Charles and Mabel don't get their money" -- no -- "If Charles and Mabel" --

A Whatever it says, there is no such paper.

THE COURT: I sustain the objection unless you establish that the witness says there is such a writing, and I believe he says there is not under date of February 5th.

Q When you wrote February 5th alongside it in this little document which you made up in preparing to come to court, QQ for identification, I take it February 5th is supposed to be the date on which the utterance was made by Mr. Persky which you ascribed to him and which I have just read off that document?

A That's right.

Q Not around that period of time but on that date?

A On that date.

Q The fact is, Mr. Silverman, that in 1969 you made certain notations on an ongoing basis, writing down chronologically and contemporaneously what was being said at the various meetings which you attended; right?

A No. I wish I could have but I didn't.

Q I'm sorry. I misspoke myself. Is it not the fact that in 1970 and 1971 you attended a number of meetings at which you made contemporaneous and chronological notations of what went on at those meetings?

A The answer is yes.

Q And would it not be a fair statement, Mr. Silverman, that what you wrote down in 1970 and 1971, at the time that it occurred, probably represents a more accurate representation of what went on than what you may recall out of memory which is in conflict with, which you wrote down, four years later?

A It's a yes-and-no answer. For example, there are some things that weren't written down that I recall. There were some things that were written down that I don't recall.

Q But if you wrote it down would it be fair to say that you wrote it down and it did happen the way you wrote it down?

A Not necessarily, no.

Q You mean what you wrote down may have been inaccurate, is that what you saying?

A May have been incomplete.

Q Are you saying that your recolleciton with what you wrote down is better five years after the event than whatever it was that you wrote down five years previously?

A You have two words in there in conflict. I don't recall anything which is in conflict. There are some things I recall that I don't find at all in those sheets.

Q When you testified yesterday it's a fact, is it not, you weren't reading verbatim at all times from those work sheets that you made at the various meetings, isn't that true?

A That's true. I used this work sheet --

Q The answer is that is true?

A That is true.

Q Next question. Is it also true that you were interpolating and extrapolating as you were testifying as to what went on at those various meetings four and five years ago?

A I don't know what you mean by interpolating and extrapolating.

Q You are an engineer.

THE COURT: I don't understand it either.

Q You weren't giving us --

THE COURT: I'm not an engineer.

MR. GRUTMAN: I am not either, Judge.

Q You were selecting and reorganizing what went on at the meetings and not reciting the way it occurred as you had it in your notes?

A I was responding to the questions.

Q If you do me the same, I would like to go back over the actual documents themselves. Would you find, please, first, the exhibit that was previously marked as Exhibit 28G.

MR. MANDEL: That's not 28G in evidence.

MR. GRUTMAN: I understand that. He has a correlation sheet.

MR. GLATZER: HH.

Q Is it not a fact, Mr. Silverman, that when you came to this meeting on December 15, 1970, you arrived late?

A That is correct.

Q You were confused?

A That's a pretty good statement. I was in a fog as to what I heard.

Q Well, before you were confused --

A You mean I had a state of confusion as I walked up to 61 Broadway? No.

Q You had a terrible seat, didn't you?

A Yes, I did.

Q So coming late, being in a fog or confused, and having a terrible seat, you missed a lot of important things that were said at the meeting, didn't you?

A I think that's probably accurate. I didn't understand all the things that were said.

Q That was the first of the meetings that you attended, December 15, 1970?

A Yes.

Q You attended a number of other meetings between that period of time up until February 11, 1970, correct?

A Yes.

Q On December 31, 1970 -- and I think it's Exhibit 50 -- between December 12th and December 31st, Mr. Silverman, can I summarize or abridge a great deal of ground by saying that a number of warring factions, general partners, limited partners, subordinated lenders and their lawyers had attempted to work out a solution to what I think you described as the financial crisis of Neuburger, Loeb?

A Well, there is a lot in that summary. I don't know that I could adopt it all.

Q Were there factions that were at odds with each other?

A The answer is yes.

Q And were these factions the general partners, the limited partners and the subordinated lenders?

A No, that's not all of them.

Q The withdrawn general partners?

A The promoters of this new corporation were at odds with the general partners. That's Risher, Muh, Kayne and Sloane. They were at odds. And Persky's firm was at odds with the generals. At the meeting of the 15th the limited partners, who had kind of had their ear turned by the promoters, were at odds with the generals. The subordinated lenders, I'm not quite sure where they fit in, but they wanted to protect their investment.

By the meeting of the 17th there was a different sort of lineup, by the meeting of the 30th there was a different kind of lineup.

I don't know if the lineup were warring factions. If anybody was warring they were the promoters on one hand and the general partners on the other, the Sterns and Neuburgers. That war had taken -- had been going on throughout the fall of '70 and culminated in the series of meetings.

Q Mr. Silverman, however the configurations changed or people shifted their alliances or changed their ground, would it be correct to state that what everybody was trying to do was to find a solution to the financial plight of Neuburger, Loeb, isn't that what they did?

A That's not what the promoters did. The promoters were trying to steal this company.

Q The promoters were what, sir?

A You heard me: trying to get this company for pennies.

Q Just a moment, Mr. Silverman, before you go any further, let's first define the word "promoter." A promoter isn't somebody in a tattersall vest, a high silk hat and a cane, right? It's a word of art?

A [illegible]es.

Q It means he is the one that fosters a corporation?

A Yes. There is no opprobrium with being called a promoter?

A That's correct.

Q All it notes, all the memos that you made at the meetings, that you made to Golenbock, Mabel Bleich, anybody in the world, please produce one piece of paper in which you ever made a memorandum five years ago in which you stated the promoters are trying to steal this corporation.

A You have read, I'm sure, the entire transcript of the 24 sessions of the arbitration before the New York Stock Exchange.

Q I have not.

A May I please finish?

MR. GRUTMAN: I ask for a document he prepared five years ago in which he made a memorandum of what he just said under oath before Judge Owen and this jury, to wit, the promoters are trying to steal the corporation for pennies.

MR. MANDEL: I object to that question as argumentative. I ask the witness be allowed to finish his answer.

THE COURT: If the question is made to read did he ever put those words down as a note --

MR. GRUTMAN: I will try doing it lowering my voice.

Q Mr. Silverman, get all the notes that you made for yourself at meetings --

THE COURT: Mr. Grutman, just ask him if he ever made a note.

Q Did you ever make a note, Mr. Silverman, of the fact that the promoters are trying to steal this corporation for pennies? Just yes or no.

A In 1971, no.

Q How about in 1970?

A No.

Q Up to February 11, 1971, did you ever make such a note?

A No.

Q As a matter of fact, I show you Exhibit 51. Who signed Golenbock & Barell on Exhibit 51 in evidence?

A I did.

Q Who composed that document, Mr. Silverman?

A I did.

Q What do you call that document?

A Well, I don't know.

Q Is it an announcement, an opinion letter, an advice, what, sir?

A It is none of those things.

Q What is it?

A It's a letter addressed to whom this may concern.

Q Was it a documentto be taken seriously?

A Yes.

Q You wrote it?

A Yes, I did.

Q Did you know that it would be received by lawyers?

A Yes, I did.

Q Did you expect the lawyers to rely upon it?

A I not only expected the lawyers to rely upon it, I expected the New York Stock Exchange to rely on it.

Q You made it with the seriousness of purpose that would be involved with such associations, is that correct?

A That is correct.

Q When you prepared that document, Exhibit 51 in evidence, had there been a certain document prepared?

A Yes, there had.

Q The document that I refer to, sir, was that intended to be a definitive agreement?

A No.

Q Was it intended to reflect an understanding or an agreement?

A An agreement in principle subject to further negotiations?

Q An agreement in principle. And did it include the so-called promoters?

A I'd have to look at the agreement to see who signed it.

MR. GRUTMAN: Do we have a copy here?

Mr. Mandel, do you have it?

THE COURT: The witness has one in front of him.

A There was a signature for the transferee corporation.

Q Those were the promoters, weren't they?

A Legally, no, but that's all right.

Q Well, the successors to the promoters, legally, yes.

A That was a corporation formed by them.

Q Risher, Muh, Kayne, Sloane, Persky, Berkowitz and the rest of the people, right?

A I don't know who the rest of the people are.

Q Kayne, Sloane, Risher, Muh and Sloane?

A Right.

Q You described Persky as the lawyer for the promoters and the rest as promoters?

A I would describe Mr. Persky as a promoter.

Q Did you ever describe Persky as a promoter in any note you made in 1970, '71? Yes or no.

A The answer is no.

Q Now, then, coming back to that document, you have now found there was a signature space on the agreement in principle arrived at on December 31st, which was to be signed by the promoters or their successors, the Transferee Corporation?

A Their alter ego.

Q And that document was supposed to be the agreement in principle, an alter ego of the promoters, the general partners, the limited partners, the subordinated lenders, correct?

A I don't even know if agreement in principle is right but I will use that phrase.

There was an awful lot to go before this became an agreement. So many terms were changed in substantial part that I don't even know it was an agreement in principle but I will use the phrase.

Q You ostensibly represented Bleich and Donoghue, didn't you?

A We did represent Bleich and Donoghue.

Q Did you represent sub silentio the interest of Charles Gross?

A No.

Q You knew, of course, that Charles Gross was a withdrawn general partner?

A Yes.

Q And you knew by the terms of the partnership agreement, which your firm had drawn -- correct?

A Yes.

Q -- a withdrawn general partner had no voice in signing that agreement in principle, correct?

A I don't know that that's correct. If a subordinated lender had to sign this agreement, if limited partners had to sign this agreement, I am not entirely certain that Charles Gross didn't also have to sign this agreement.

Q We will pass that for the moment.

Did you not on December 31, 1970, in the letter that you expected to be relied upon by the lawyers and the New York Stock Exchange, state as follows:

"The signature of Golenbock & Barell, as attorneys at law for Jeanne G. Donoghue, does not represent her consent to or acceptance of any of the provisions of the annexed agreement but merely represents that Golenbock & Barell:

"1. Believes the agreement to be in her best interest.

"2. Will undertake with reasonable dispatch to apprise Mrs. Donoghue of the provisions of the agreement and to recommend her acceptance thereof."

That's the language that you composed on December 31, 1970, did you not, sir?

A Based on the false information I had, yes.

MR. GRUTMAN: Move to strike the latter part of the answer.

THE COURT: Yes, strike it out.

Q Is there anything funny, Mr. Silverman?

A I said you meant the former part, not the latter part.

MR. MANDEL: Did your honor strike that?

THE COURT: Yes. The balance was not responsive toi the question.

Q Mr. Silverman, from the same deposition, which was taken of you in April of 1974, I am going to ask you whether or not you recollect, and of course you can refresh your recollection from your own copy of the transcript, which you have apparently taken out, before you, and since mine is unconformed, before I read it may I see it to see whether there are any changes on page 310?

A There are no changes.

Q Do you remember being asked these questions by my partner, Herbert Frederick Roth, page 310, line 3:

"Q Do you decline that answer as framed by me based upon attorney-client privilege, Mr. Silverman?

"A I can answer the question and say that I advised Mrs. Donoghue to consent to the reorganization. If you require a different answer, you know, an answer, that is,, if you think that answer is not responsive, then I can't answer beyond this. I did advise Mrs. Donoghue to consent to the reorganization.

"Q Was that your good-faith advice based upon all the knowledge that you had as of that time?

"A Yes, sir."

Do you remember giving those answers in 1974 under oath at your deposition, Mr. Silverman?

A Yes.

MR. MANDEL: One moment,.please. I may be a little bit late but I am going to move to strike the questions and the answers on the ground that they are in no way in opposition to what the witness said today.

THE COURT: They may or may not be.

That's for the jury to decide.

Q Mr. Silverman, while you were representing Mabel Bleich and Jeanne Donoghue, Charles Gross was being represented by Phillip Mandel, is that correct?

A There was a seven-day period when I guess Charles Gross was unrepresented.

Q After that little interstice was crossed Charles Gross was represented by Phillip Mandel; right?

A Correct.

Q And Phillip Mandel was recommended to Mr. Gross by Justin M. Golenbock, your senior partner, wasn't he?

A I don't know that. I had assumed that.

Q You know Mr. Golenbock and Mandel were college students, just as Mr. Gross, and Mr. Golenbock knew Mr. Gross since 1938?

A I know Mr. Mandel was a neighbor of Mr. Gross', so I don't know how he came to Mr. Mandel.

Q Do you know whether in any, representing Donoghue, you were also representing the interests of Charles Gross?

A We were not in any way.

Q At page 312 of your deposition do you remember being asked the following questions and giving the following answers beginning at line 8:

"Q What answer did you give?

"A I said that Mrs. Donoghue would not sign as a matter of principle.

"Q Did anyone ask you what the principle was that was involved as to why she wouldn't sign this deal that you thought was in her best interest?

"A Yes, sir.

"Q What was your response to that?

"A My response was that she would not sign as a matter of principle because she felt that the parties who proposed and were consenting to this transaction were doing so in a fashion which was totally unfair and irresponsible to her brother."

Do you remember giving that answer in 1974?

Yes.

Q And the brother that she was referring to was Charles Gross, is that correct?

A Correct.

Q Going over to page 317, beginning at line 2 --

MR. MANDEL: How far are you going, Mr. Grutman?

MR. GRUTMAN: I am going down to 318, line

24. It's about eight questions or less.

MR. MANDEL: No objection.

Q Then I will finish with the deposition, Mr. Silverman. Take heart. Line 2, page 317:

"Q Give me your best recollection as to sum and substance as to such conversation or conversations in terms of who said what to whom and who else was present or party to said conversation.

"A The parties to the conversation with Mr. Mandel and myself and no others. The substance of the conversation was that Mr. Mandel said that in his view the transfer agreement was illegal and violated law for a number of grounds. He said that he believed it violated the partnership law but I do not believe he mentioned a specific section. I don't believe I queried him on any specific section. He said he believed that a transfer of partnership assets requires the consent of all partners, general and limited, for a transfer to be valid. He said under the circumstances of this particular transfer, where special consideration appeared to be given to certain of the general partners in the form of either preferred stock or in the form of release of indebtedness, that the partners so acting were breaching their fiduciary responsibility to Charles Gross.

"He said that additionally he pointed out that the persons who were promoters of the new corporation were being represented by counsel who was representing the partnership. The people who were giving, presenting all the facts at all of these various meetings that I had attended, were primarily the persons who would be the promoters of the new corporation; that there was no -- in his judgment he didn't know whether this information was correct or incorrect.

"My response to Mr. Mandel was, 'Well, look, that is the only information as far as the information goes. That is the only information I have. I can't make the assumption in advising my clients that that information is wrong, though it well may be. I can't make that assumption if Charles Gross feels it is wrong. But I can't make the assumption itself. I have to advise my clients in the manner that I see fit and assume if transfer is illegal as presently structured, it will at some point be structured in such fashion that it will become legal, because I was certain that an illegal transfer would not go through.'

"That was the sum and substance of conversations. I think I can't pick them apart as to what specific things were said at specific times. While I think they took place on or prior to January 14th, some of what I have just told you may well have taken place after January 14th. I can't represent to you that my present recollection is that everything I have just said was imparted to me on or prior to January 14th, but at or about that time would be my answer."

Do you remember making that answer to that question or those questions and those answers?

A Yes. There is some reporter's confusion in a couple of lines but it doesn't change the substance.

MR. GRUTMAN: Would this be a convenient time for our recess?

THE COURT: Yes.

(Recess.)

BY MR. GRUTMAN:

Q Mr. Silverman, kindly go to Exhibit HH, previously marked as 28G, and if you would go to the second page of that particular memorandum which is of the famous December 10, 1970 meeting.

A It begins with the word "Discussion" at the top?

Q Yes. It begins -- and I am going to read to you, Mr. Silverman, and you tell me if I can decipher your handwriting, exactly what you wrote on December 10, 1970:

"Discussion Re Tax Refund. Max" -- and that's Mr. Freund?

A Yes.

Q -- "With refunds coming due, who has the right to them? The partners -- personal obligations and" -- what's the next word?

A "Firm creditors."

Q "If not money in firm" --

A May I read it?

Q I would be happy if you would.

MR. MANDEL: I can't find it. Is it page 10?

MR. GRUTMAN: 7.

A Let me start from the beginning.

Q "If put money in firm they are defeating their individual creditors. Requires discussion if intended creditors of good partners."

A Let me start it.

Q Please begin at "Requires."

A "Requires discussion with individual creditors of general partners because they may have priority creditors. AR" -- Arthur Richenthal -- "says this isn't so. Max wants a statement that limited partners to extend time. Arthur Richenthal says if you want a commitment we have to know what the GP" -- general partners -- "will do."

Q I will read the next entry:

"If Neuburger, Loeb goes down the road" -- does that mean down the tube, into bankruptcy?

A Yes.

Q "If Neuburter, Loeb goes down the road many claims will be made against all general partners, particularly one who isn't here today (Charles Gross)."

That's what you wrote on December 10, 1970, correct?

A Correct.

Q Robert Persky wasn't at the meeting, was he?

A As far as I know, he was not.

Q So then who was it at the meeting other than Robert Persky or somebody from Finley, Kumble who was talking about claims that would be made [illegible]inst Charles Gross?

A There were claims being made against general partners, particularly one who isn't here today.

Q Charles Gross?

A And my recollection was that that was Arthur Richenthal.

Q But the recollection about the partner they were fingering, Charles Gross, is precisely what you wrote?

THE COURT: Sustained.

Q Was any other partner designated other than Charles Gross, by name?

A "Many claims will be made against all general particularly one who isn't here today (Charles Gross)."

I have already testified by this time he was a scapegoat.

Q I didn't ask whether he was the scapegoat. I asked whether any other general partner was singled out as the person who would be the object against whom claims would be asserted or prosecuted.

A This statement doesn't indicate so. But there were statements made against other partners.

Q In the writings --

A In the writing --

Q Sir, withdrawn.

A In those three lines there is no proper noun --

MR. GRUTMAN: No question before the witness, your Honor.

Q My question is: in the writing is there any other designated --

THE COURT: It is obvious there isn't.

Q Not only in that entry but any other entry at this meeting?

A I think that's accurate.

Q If you would, please go over to page 8 of the notes that you made at the December 10th meeting.

A What were we on, 10?

Q 8. "Can't get capital" --

A These are not numbered pages.

Q It is the next succeeding page.

"Can't get capital" --

A Wait. You said page 8. I went backwards. I will go forwards. All right. Page 11, you mean.

Q I have "Can't get capital until stop the erosion of capital. Must cut costs. Then can have profitable firm. Then can get new capital in. AR" -- Arthur Richenthal -- "wants to make sure tax refunds go to firm first and not to creditors of individuals. Max won't put into firm and have limited partners take it out."

Then Arthur Richenthal:

"If you want the limited partners to voice confidence, the general partners must voice confidence by giving tax refund money to the firm."

Is that correct?

A Right.

Q Does that refresh your recollection that there was a general give and take about the treatment of the tax refunds?

A Yes.

Q Does it also refresh your recollection that one of the principal considerations between these various factions was that nobody wanted anybody to have the advantage of taking cash out of this sick firm?

A That certainly was one of the matters discussed.

Q And was it not a recurring light motife through these various meetings, that people were concerned to see that nobody took cash out of this firm?

A I don't know that -- whatever the phrase was you used, it certainly was at this meeting. The limiteds said generals don't pay the subordinateds unless you get court approval, and the limiteds said that "We want our money unless you put in your tax refund money." There was a concern that if there wasn't enough money to go around, certain people might be taking it out at that time.

Q Go over to page 11.

A I'm on 11.

Q Do you have the page which says, "Muh and Risher called in"?

A I'm there.

Q "Muh and Risher called in. If they can make Neuburger, Loeb viable and make a million dollars available, they take over and give the limited partners in excess of 50 cents on the dollar as capital. Stock in Bacardi Corporation would have to liquidate part or all of stock to provide cash necessary to run the business. They would be active management."

Who invited Muh and Risher in?

A Steefel or Richenthal.

Q And they were lawyers who represented the limited partners, correct?

A Richenthal did and Steefel I don't know, he at times thought he was a subordinated lender and other times a limited partner.

Q You were at the meeting?

A Yes.

Q Mr. Risher, the handsome fellow in the striped suit who has been in court, you recognize him?

A Yes.

Q The man who joined us on the far left is Mr. Muh; do you remember him?

A I remember Mr. Muh from college days.

Q MIT?

A That's right.

Q Were you in the CIA also, Mr. Silverman?

A No.

Q They were called in. Does that indicate, from what you wrote in 19 --

MR. MANDEL: I move to strike that on behalf of the CIA.

THE COURT: It may be stricken.

Q That means they were invited in, weren't they?

A They were called in. The word "invite" is -- they were called in.

Q From the knowledge you had acquired at this meeting and before, Mr. Silverman, is not the

the fact that the financial predicament of Neuburger, Loeb had been such that the then management of the firm had been unable to provide the additional capital that the stock exchange required as a condition for Neuburger, Loeb's survival?

A The question assumes a state of fact which I'm not sure is true.

Q Weren't you aware that on November 17, 1970 the Department of Member Firms had advised Neuburger, Loeb that unless they acquired additional capital the exchange would suspend them?

A I read that letter and I have also read some notes of a meeting held on that day, and I think that your question [illegible] a loaded question with a statement of fact which isn't true.

Q You mean that the stock exchange was not requiring Neuburger, Loeb to beef up its capital or go out of business?

A That's not the question. The question was what would the New York --

Q First answer that question.

THE COURT: No.

MR. GRUTMAN: I will withdraw the question.

MR. MANDEL: I object. We have had this time and time again.

MR. GRUTMAN: I don't get an answer. I get a diffuse fog.

THE COURT: You have been accepting the answers that you have gotten. You then follow the answer you get and come back. If you want me to hold Mr. Silverman to strictly responsive answers, I will do it. But I think that the pace of the thing ought to be such that the jury and I have some idea of which question the witness is endeavoring to answer.

MR. GRUTMAN: Judge, I hope, without wasting time, I will slow it down.

MR. MANDEL: We still have an open question.

MR. GRUTMAN: I have withdrawn that question.

THE COURT: That's withdrawn and we are going forward.

Q Mr. Silverman, were you aware on November 17, 1970 the stock exchange advised Neuburger, Loeb unless they improved their capital they would be suspended?

A I can't answer that question because it assumes a state of fact.

May I tell --

Q You can't answer that question as I posed it?

A If the limited partners would keep their capital in, that would save the New York Stock Exchange. That's what they were complaining about.

Fred Kayne had resigned as the managing partner --

MR. GRUTMAN: Your Honor, that's not responsive to anything.

MR. MANDEL: I object to having the witness interrupted.

THE WITNESS: Can I have that letter of November 17th in front of me? I have notes of a meeting at which Mr. Persky spoke the day after.

Q I will read to you, sir --

MR. MANDEL: Your Honor, may we have a ruling? May Mr. Silverman finish his answer?

THE COURT: He said he was unable to answer because it assumed a state of facts he didn't know to be so.

Q I'm reading to you, sir, from Exhibit 1 in evidence:

"Under the circumstances and in view of your impaired capital position and loss trend, this department is left with no alternative but to approach the Board of Governors and ask for suspension under Article 13 of the Exchange's Constitution if your 'required excess capital' is not met by the close of business of December 20, 1970."

It goes on.

"In the meantime you are directed to take every possible anticipatory step to prepare for possible liquidation of your firm, such as discontinuing any purchases for your firm trading, investment accounts, liquidating proprietary positions and other administrative procedures in the event of a suspension by the Board of Governors.

"Please evidence the receipt of this letter by signing the enclosed copy and returning it promptly."

Does that refresh your recollection of the threat with which Neuburger, Loeb was confronted from November 17, 1970 on?

A My recollection was refreshed prior to reading the letter, so I can't say my recollection was re-refreshed. I'm saying --

Q That's all I asked for the moment.

Q Had anybody been able to provide additional capital for Neuburger, Loeb between November 17, 1970 up to December 10, 1970?

MR. MANDEL: I object on the ground that it's irrelevant, no foundation has been laid. Mr. Grutman has been following a procedure here where he asks a question --

MR. GRUTMAN: That's a type of objection that invites a knee-jerk response from me.

THE COURT: I don't understand the purpose of the whole reading, quite sincerely.

MR. GRUTMAN: I wanted to show him the threat under which the stock exchange placed the firm because of their impaired capital position.

THE COURT: That wasn't the question you had earlier asked him.

MR. GRUTMAN: I withdraw the earlier question and read him this question as a predicate for the following question, namely, that the stock exchange had alerted the firm because of their impaired capital and threatened liquidation. The following question I asked was, had anybody been able to provide additional capital for Neuburger, Loeb between November 17th and December 10th, and then Mr. Mandel got on my heels and here we are.

MR. MANDEL: That's what I object to because no foundation has been laid. Mr. Grutman is making an assumption that the stock exchange is requiring additional capital and this witness has already said, and it is quite clear, that all the stock exchange wants is for the limiteds not to withdraw their capital and maintain it.

MR. GRUTMAN: I implore the court to please spare me this.

THE COURT: If there is no foundation for the question for a period prior to that letter, then I will sustain that objection.

MR. GRUTMAN: There is no foundation, Judge?

THE COURT: Yes.

MR. GRUTMAN: That letter doesn't provide the foundation?

THE COURT: According to what we have here in fragmentary form, it is not so much a question of new capital as it is holding in old according to this gentleman. Am I correct about that on this state of the record?

MR. GRUTMAN: Maybe perhaps.

THE COURT: Maybe perhaps then there is a basis for my sustaining the objection.

MR. GRUTMAN: The answer is no because yesterday he testified as to the losses the firm was sustaining, $160,000 a month. My present recollection --

THE COURT: Gentlemen, I have brought my "machine" into court here to give myself some assistance at these times.

MR. GRUTMAN: Your Honor, my recollection is that it was a combination of the erosion of capital, the losses that were being sustained that prompted the stock exchange to alert Neuburger, Loeb. I believe that's in the record already. If it isn't I will put it in again.

MR. MANDEL: May I be heard for a moment?

THE COURT: No. Let's see if we can proceed with questions that are based on proper foundation.

While Mr. Grutman is posing the question I will look at the exhibit you want to give me.

MR. GRUTMAN: I was raised in Judge Dimock's court and he taught us that all lawyers stay in their place.

THE COURT: You are in my courtroom now. I will permit you to go over the white line on the appropriate occasion.

MR. GRUTMAN: I will go back to 28G, which is now marked HH.

BY MR. GRUTMAN:

Q On the second page, Mr. Witness, did you not write the following:

"His opinion is that all capital of the limited partners is now gone, starting to erode capital attributed to subordinated lenders. If loss is not stopped, no capital by the end of the first quarter of 1971."

The next page:

"If liquidated now all subordinated capital would be gone."

Did you write that on December 10, 1970? Yes or no.

A Yes.

Q Who said it?

A My best recollection is that the statements at the bottom of page 2 were said by Mr. Risher or Mr. and possibly by Mr. Gutman but I don't think so.

I have previously testified on my deposition it might have been said by Max Freund but I'm certain it wasn't.

Q Did anybody dispute that at that meeting which you noted down in the notes which you took?

A Well, the answer is it wasn't necessarily taken at face value.

MR. GRUTMAN: Your Honor, may I ask that be stricken and that the witness be directed to answer the question as posed.

THE COURT: What was the question.

(Question read.)

THE COURT: Did you put any such thing in your notes?

THE WITNESS: I have a statement that Arthur Richenthal doesn't want to throw in the sponge. I have a statement that the stock exchange was going to send in examiners to find out if they were in compliance and by the next meeting on the 17th there was a statement made they were in compliance.

THE COURT: Specifically the question that Mr. Grutman put to you, you don't have that in your notes?

THE WITNESS: I would say that's true.

Q Were you aware from notes taken on December

10th by you that the November operating loss was 160 to 180 thousand dollars and that the November revenues were one-half the October revenues?

MR. MANDEL: I object to the form of that question because all the witness could be aware of from the notes is that somebody said that.

THE COURT: Sustained.

Q Did somebody say that at the meeting?

A Yes.

Q Did anybody dispute it?

A Not that I recall.

Q Did you believe it?

A At that time.

Q Who said it?

A I think Mr. Gutman.

Q Based upon the shrinking revenues and the erosion of capital which had been going on and which appeared to be continuing, was it said at the meeting that what the firm needed was both to stanch the flow of outgoing capital by withdrawing limited or general partners, to cut costs and to provide additional capital?

MR. MANDEL: Object as to form.

THE COURT: Overruled.

A Different people said different things. Some people thought that the secret was to cut costs and some of what they said was right, some of what they said was wrong.

Some people thought that we have got to stem the flow of limited partnership capital, at least for a period, in order that the exchange not suspend Neuburger, Loeb. I think it was fairly clear at that meeting that that was a minimum to avoid suspension, at least for a period of time.

There was discussion at the meeting when Mr. Risher and/or Mr. Muh presented their proposal that they would make assets available to the firm, they would hope to do that in the form of Bacardi stock. That's not cash but they would try to make something available to the firm if the various interested parties would agree to it and they could get a commitment.

Q You knew, did you not, if a million dollars in subordinated debt in the form of Bacardi stock were put up the exchange would recognize it as good capital?

A The answer is no, the exchange first applied a haircut of 70 per cent when that came in. A haircut means they did not ascribe full value to it. They ascribed a value of $225,000. They didn't ascribe any value to it from February 11, 1971 or after May of 1971, and I ascertained that from a memorandum in the files of the New York Stock Exchange.

So you can't say merely putting up the stock ipso facto led to a recognition of the market value of that stock at good capital. I do not.

Q You know a million dollars in Bacardi stock was put up?

A Something like that.

Q Do you know that the exchange approved Neuburger, Loeb & Co., Incorporated?

A Yes.

Q Under the transfer agreement of February 11th?

A I make that assumption.

Q Would you go, please, on this continuing exhibit to what you wrote on page 13:

"The limited partners, $1,950,000 at stake."

What does that mean?

A Apparently meant that the limited partners had $1.950 million invested in Neuburger, Loeb and at stake was that investment.

Q Then it says:

"Present general partners out completely as far as management is concerned. Perhaps a stock position for them. We don't care who gets what stock says Steefel."

Correct?

A That's correct. You have read it accurately.

Q That's what you wrote?

A Accurately, yes.

Q "Back office losses taken in 1970 and attributable to entire period are what broke the firm. Arthur Richenthal believes you can prove this is Charles Gross' fault."

Is that correct?

A That's what I wrote and Mr. Richenthal was so wrong.

MR. GRUTMAN: I move to strike the latter portion of this answer.

THE COURT: Strike it.

Mr. Silverman, just answer the questions responsively.

Q Did Mr. Richenthal saythat?

A Yes.

Q Mr. Silverman, did you ever write a memorandum that there was a conspiracy involving Persky and Finley, Kumble?

A I don't recall any such memorandum.

Q Pardon?

A I don't recall writing any. I don't think I did.

Q To the best of your recollection?

A That's the best of my recollection, I did not.

Q Did you ever write or say to Bob Persky or anybody at Finley, Kumble in words or substance, "I don't like what you guys are involved in here. I think you are part of a conspiracy"; did you ever say that to them?

A At what point in time?

Q - Up to February 11th.

A No.

Q Had Bob Persky dealt with you openly throughout all of the course of your dealings with him?

A I thought so at the time. I don't think so today.

Q And what, Mr. Silverman, is the basis of your statement that he didn't do so so far as your present thinking today?

Wait a moment. Iwill withdraw that question. I have a few I want to ask beforehand.

Q Did Bob Persky send you copies of all the drafts of all the memoranda?

A I don't know.

Q Were you on the distribution list?

A At some point in time I think I was. I don't know. I received a lot of documents. You asked me did he send me copies of all of them, and I don't know.

Q Through the course of your dealings did you write him letters which concluded with "Thank you for your cooperation in these matters"?

A Yes, and I addressed him as "Dear Bob."

Q It was "Bob" and "Arthur," wasn't it?

A That's right.

Q Did Mr. Persky, in the role which he played, play sort of in the dark?

A I think so.

Q What did he do in the dark?

A We did not know -- I did not know. I am not going to talk about "we." I did not know at any time up through February 11, 1971 and for a good deal thereafter the extraordinary efforts that were being played out in the fall of 1970 whereby Risher, Muh, Kayne, Sloane, Berkowitz and Persky pushed out the Sterns and the Neuburbers and created a crisis situation and distributed what I treat today to be false financials.

I did not know, for example, that in early -- that in October, 1970, as your partner, Mr. Bamberger testified before me under oath --

MR. GRUTMAN: Mr. Bamberger hasn't testified, your Honor.

THE COURT: Just give us facts.

Q What happened?

A The Finley, Kumble firm was preparing in October draft agreements for a corporation. I did not know that Mr.Berkowitz had been promised by Mr. Kayne, before he came to New York, that acorporation -- it was contemplated that a corporation might well be formed and Mr. Berkowitz would be a part of that; that on October 7th or thereabouts Kayne and Sloane had submitted their resignations to the Neuburger, Loeb partnership, Kayne having been its managing partner since August 11th; that the next day he retracted his resignation; that on that day the lease at the California Avenue office on the Avenue of the Stars was expanded; that Fred Kayne became chairman of the executive committee in addition to being the managing partner; that Sloane was added to the executive committee; that a salary proposal was raised in which the Neuburgers and Sterns took cuts in salaries and Risher and Muh were increased in salaries from $5000 a month to $8000 and later to $10,000 a month; that after Risher and Muh were installed as the chief operating officers of Neuburger, Loeb Mr. Kayne resigned in early November, throwing the firm into crisis, leading the limited partners to give notice of withdrawal of their capital, while he went back to the West Coast --

Q Because his wife was dying of cancer.

THE COURT: Strike that.

MR. GRUTMAN: Your Honor, may I interrupt?

THE COURT: I'm afraid you can't. You asked him what was done in the dark and he is telling you.

A I did not know on September 16, 1970 Mr. Kayne had sent a letter to all of the customers of Neuburger, Loeb --

MR. GRUTMAN: Your Honor, I asked what Bob Persky did in the dark and I am listening to a diatribe of denigration and disparagement which I don't know where it originated --

THE COURT: Hold up a minute. Let's get the question read.

MR. GRUTMAN: What did Bob Persky do in the dark?

THE COURT: It was a question different than you stated.

(Question read.)

MR. GRUTMAN: You Honor, I have asked about Mr. Persky and I have listened to Risher, Kayne, Sloane, false financials. All I have heard about Persky is that his law firm prepared false financials. Other than that it is just a spew which I request you strike from the record and instruct the jury to disregard.

My question was what Bob Persky did, not what all the other people do at the Avenue of the Stars, the resignation of Mr. Kayne in 1970, or the Neuburgers and others being pushed out. That's not Bob Persky. This is this man and Mr. Mandel.

THE COURT: That compounds the problem. How did Mr. Mandel's name get into this? What justification do you have for making that statement ?

MR. GRUTMAN: I heard it originally from

Mr. Mandel. Now I am hearing it out of this man's mouth.

THE COURT: I think that is inappropriate. That comment is equally stricken.

The problem I have is how much of this I should leave in, inasmuch as you let it go on and on. The first time that you had a chance to interrupt was not to cut it off but to comment that Mr. Kayne went back to California because his wife was dying of cancer. That was not an objection to the fact it was not responsive. That was an interjection on your part. I don't know how much to strike, quite frankly.

MR. GRUTMAN: I am asking your Honor to strike eveyrthing which is not responsive to the question, and the question solely was what did Bob Persky do in the dark.

THE COURT: I am going to strike everything after the word "cancer." Before that may stand.

MR. MANDEL: Your Honor, would it be to ask the witness whether he believes Persky was behind these things in the dark? He is answering a question in his way.

THE COURT: I think that the question has to be answered responsively by the witness. If the witness is prepared to answer this question responsively -- and the reason I am permitting the rest to stand is that, Mr. Grutman, you made no effort to cut it off and therefore, permitting it to continue as you did, I don't see that it is appropriate at this point to strike it.

MR. GRUTMAN: Judge, I didn't know I would be held to be guilty of laches. I was astounded to hear this. I was waiting for the connection but there is none.

THE COURT: Now you sayaall of these things he was saying were nonresponsive and you heard them all come in.

MR. GRUTMAN: I was partially stupefied by what I heard and I was waiting for something to come out.

THE COURT: I cannot believe that you with your skill could be stupefied on any occasion in this courtroom.

We will have a responsive answer to that question at this point.

MR. GRUTMAN: Can I go on and ask the next question?

THE COURT: You asked him what Mr. Persky had done in the dark and I think a responsive answer to that question is now presumably forthcoming.

MR. GRUTMAN: I would like to continue with the next question.

THE COURT: I take it the witness is going to be more focused in his answer.

Q What are we going to have that Persky did in the dark?

A Persky was at that meeting of October 9, 1970 when the new salary proposal was voted on and the salaries of the Sterns and the Neuburgers were cut back and the salaries of Risher and Muh were advanced, and it was at that meeting of November 5, 19 --

Q May we stop right there? Was that a meeting at night with the lights out or was it an open meeting, the October 9th meeting with the change in salaries?

A I assume the lights were on.

Q Was it an executive committee meeting of Neuburger, Loeb?

A Yes.

Q Did people vote?

A Yes.

Q Did anybody hold a gun to anybody's head?

A Don't know.

Q You weren't there, were you?

A That's correct.

Q There were minutes of that meeting, weren't there?

A That's right.

Q Yet you call something done in the dark?

A I call what --

Q Just yes or no.

A I call --

Q Yes or no, please.

MR. MANDEL: I object to that.

MR. GRUTMAN: I don't wish to invite another torrent of nonresponsive diatribe.

THE COURT: I sustain your position, Mr. Grutman. I think the witness should say whether he regards this as something done in the dark or not, as he characterized it here.

A Done in the dark in respect of what we were told in December and January of 1970 and '71 and February of 1971, yes.

Q Mr. Silverman, you were just reading from executive committee meeting notes of the Neuburger, Loeb firm, weren't you?

A The minutes.

Q The minutes. That means that what was done was done openly, notoriously and transcribed, correct?

A With respect to those --

Q What was done?

MR. MANDEL: I object.

A I can't answer that question except in the context of your question, which was was he open with respect to us as to what happened at those meetings on those dates at that time, and that answer is no, sir.

Q You describe the change in salaries as something done in the dark and you said the Sterns and Neuburger's were pushed out, is that right?

A Certainly were. Andrew Neuburger was kicked off the executive committee, replaced by Chuck Sloane.

THE COURT: The answer is yes, pushed, out.

Next question.

Q Werethere votes taken?

A Yes.

Q Did what the executive committee did in the changes and composition of the executive committee get done by the democratic process of a vote according to the minutes that you are reading from?

A The minutes indicate that votes were taken and that's how the decision was arrived at?

Q And Robert Persky didn't cast one vote, did he? Did he, sir?

A He did not cast a vote. It's my opinion that he was behind the votes that were cast.

THE COURT: He did not cast a vote, period.

Q The vote that you are talking about and the changes in the composition of the executive committee were acts that were done by persons who were members of Neuburger,Loeb & Co., correct?

A That is correct.

Q And Robert Persky wasn't such a person, was he?

A He was not a member of Neuburger, Loeb directly.

Q Did Andrew Neuburger write a letter protesting that I have been done in by Bob Persky or some cabal?

A I don't know.

Q You looked at a lot of documents. Have you seen any such?

A No, I have not.

Q How about the Sterns? You said that the Sterns were kicked out, is that right?

A Bob Stern was, yes.

Q You said the Sterns, sir, plural.

A Richard and Robert.

Q Did they go along and stay in Neuburger, Loeb after the change in the composition of the executive committee?

A As far as I know, they did.

Q Is there any notation in the minutes of the executive committee recording a protest or an outcry by them that what was done was something done in the dark or wrong?

A No, such indication.

Q Any letter written to the executive committee to that effect?

A I don't know.

Q Have you ever found a shred or scrap of paper by either the Neuburters or the Sterns protesting that some surreptitious, secret thing was done which

Bob Persky was the author of something done in the dark?

A I have not found such a paper.

Q Have you looked for it?

A I have not looked for such a paper.

Q Have you found anything that supports the contention and smear that you have made about Bob Persky insofar as you just testified?

THE COURT: Sustained as to form.

Q Have you found anything, any piece of paper anywhere, Mr. Silverman, that supports the suggestion that you made that the contention for the changes in the executive committee membership was in some way engineered by Bob Persky or anybody from Finley, Kumble?

A I believe that those minutes support my opinion.

Q Show me the minutes.

Without looking at the minutes I offer them in evidence.

THE COURT: Show them to the other side.

THE WITNESS: Shall I pull them out of this binder?

(Defendant Finley, Kumble Exhibit J was received in evidence.)

xx

Newburger, Loeb & Company, Inc.

v. 71 Civ. 685

Charles Gross, et al.

New York, New York

July 9, 1975
10:00 a.m.

- - -

(Trial resumed.)

- - -

(In open court; jury present.)

ARTHUR SILVERMAN, resumed.

THE WITNESS: Your Honor, may I be heard at the side bar?

THE COURT: Come around.

(At the side bar.)

THE WITNESS: Yesterday I testified that in respect of reading depositions in this action, I had read a portion of the Risher deposition. Last night I recall that I also read in their entirety the Sloane deposition and the Kayne deposition. So that actually my answer is not complete.

The second thing is when I was asked when can I learn that the financial statements were false, I said it was when Exhibit 17 was marked, which was in March '73. The date is correct but it wasn't just Exhibit 17, it was also a financial statement that I reviewed I don't know when, but some time after February 11, 1971. It was a financial statement attached to the final agreement.

THE COURT: All right.

THE WITNESS: So I would like to make those changes.

THE COURT: Why don't you at some appropriate time you should inquire into that.

MR. GRUTMAN: I will consider it, Judge.

THE COURT: Mr. Mandel, tool.

Whatever time you do it, it would be appropriate to bring out that you brought it to my attention at the beginning of the morning July 9th, before the session started.

(In open court.)

CROSS EXAMINATION (Continued)

BY MR. GRUTMAN:

MR. BIEHL: Your Honor, would it be appropriate, rather than have Mr. Kayne introduced to the jury and yourself, to indirectly introduce him?

THE COURT: Please do.

MR. BIEHL: This is Mr. Kayne, ladies and gentlemen.

Q Mr. Silverman, I invite your attention to the document which you prepared called the balance sheet of Newburger, Loeb & Company, which you prepared on July 4, 1975.

A Which exhibit number or letter?

Q Mr. Mandel took the exhibits last night. Do you have them?

THE COURT: You all had copies of them, I take it.

MR. GRUTMAN: Copies were made but Mr. Mandel kept the originals.

MR. MANDEL: That is not right.

MR. GRUTMAN: He made it for me but the originals are in the hands of the witness.

A I see the one you have. That's Q.

Q These were prepared by you last weekend; is that correct?

A Not the balance sheets. The balance sheets were prepared by I don't know whom. These schedules were prepareed me taken from balance sheets that I received at these meetings or by hand deliveries in the fall of 1970 and the beginning of 1971.

Q Mr. Silverman, the document which is marked as the exhibit was prepared by you --

A On July 4, 1975, that is correct. In fact, I prepared another one last night.

Q I didn't ask whether you prepared another one. That's Exhibit Q; is that correct?

A Yes.

Q Are you an accountant?

A No.

Q Have you had any special training in the accountancy?

A I would say no, though I did take a course in accounting. I would really have to say no special training.

Q Very well. What you have done on the first page of Exhibit Q is to set forth what the balance sheet reflectio was as of November 27, 1970, which was delivered on January 13th, and in a separate set of columns the balance sheet as per the December 31, 1970 statement prepared by Peat, Marwick & Mitchell; is that correct?

A Yes. On this 2-page schedule, that's correct.

Q So, therefore, Mr. Silverman, what the first page of Exhibit Q shows is a reflection of two different moments in time as to what the financial condition of Newburger, Loeb was; isn't that so?

A That is not so because I don't believe the statement of November 27, '70 was a true statement.

Q I didn't ask that.

A You said did it reflect the statement of financial condition and I said this does not.

Q I said, Mr. Silverman, isn't it true that the figures you have set out reflect what the alleged financial condition of Newburger, Loeb was at two different points in time?

A Yes, with the word "alleged" the answer is yes.

Q And isn't it also true, Mr. Silverman, that the financial condition of a business entity changes from day to day?

A In a technical sense, yes. In a layman's sense not really, but in a technical sense, yes.

Q Isn't it true what the financial condition of a business is on November 27th, 1970, is not necessarily what the financial condition or position of the business is a month later?

A That is true.

Q And, therefore, the two sets of figures which you have on the first page of Exhibit Q are two sets of figures which relate to two different points in time, relating to

Newburger, Loeb; isn't that true?

A Two points of time separated by a month.

Q Correct.

A Right.

Q Do you of your own knowledge know what the actual financial condition of Newburger, Loeb was on November 27th, 1970, yes or no?

A No.

Q And do you know what the actual financial condition of Newburger, Loeb & Company was on December 31, 1970?

A Only that it was better than show, but I don't know whatit was.

MR. GRUTMAN: I move tha the former part of the answer be stricken as surmise. How could he know what it was if he had no knowledge himself?

THE COURT: Let me hear the question.

(Question and answer read.)

THE COURT: Yes, I will strike that answer.

Q If you would, Mr. Silverman, would you look at the second page of Exhibit Q. You have made a note at the bottom of the page in red ink; is that right?

A Yes.

Q That note represents your editorial comment on the figures which are reflected on Exhibit Q; is that also correct?

A Represents my comment. I don't know that I would go along with your word "editorial."

Q Your comment is your opinion; is that correct?

A I would say not opinion as to one and I would say hearsay as to two. But I wouldn't say opinion there either.

Q I am going to read the two notes. The note says "One, the net worth figures do not take into account the liabilities of the general partners to the firm. As consideration for the release of certain indebtedness said general partners agree to pay to the firm $915,347 fully secured by assignment of tax refunds."

That is the first note; is that correct?

A Thatis correct.

Q Is it not also the fact, Mr. Silverman, that as of December 31, 1970, the later of the two periods reflected on the document, the assignments had not been executed, I don't know but I think that's a fact, that they had not been executed?

A I don't know but I think that's a fact, that they had not been executed.

Q Do you also know --

A Although at the meeting of December 30th the statement was made -- that was that all night meeting -- the statement was made that the liabilities of the partners to the firm, at least to the extent of the $913,000, could be considered an asset of the firm.

Q Mr. Silverman, the question was as of December 31, 1970, the later of the two periods reflected on Exhibit Q, the assignment of the tax refunds had not been executed, isn't that true?

A I said I don't know but I think it is true.

Q Do you also know, Mr. Silverman, that until the time when the assignments were executed they could not be counted as assets of the firm; do you know that? If you don't just tell me that.

A I think quite to the contrary. I think that for purposes that we were being asked to look at these figures in the fall of 1970 --

MR. GRUTMAN: Your Honor, the answer is already complete and I at the earliest opportunity ask that the gratuitious additional comment be stricken and the witness instructed to make responsive answers.

THE COURT: How much of that answer are you willing to permit to stand?

MR. GRUTMAN: The first part of it which says

"I think not." That much I am willing to stand.

THE COURT: At this point we will permit that part to stand.

MR. GRUTMAN: What is your Honor's ruling on my motion?

THE COURT: Permitting what you said to stand and the balance is stricken. That doesn't mean that appropriate questioning may not be made at some future time.

Q Is it your position, Mr. Silverman, that the assets of the firm were understated by $913,347?

A For purposes of liquidation --

Q Would you answer that question.

A I have to state for what purpose.

THE COURT: I will permit this.

A You just can't answer these questions in a vacuum like you want me to.

For purposes of liquidation it was understated by a million six,which was the total indebtedness of the partners to the firm. And those figures I got from reviewing work papers of Peat, Marwick at the opening audit of the coproration and the closing audit of the partnership. I reviewed those records at the offices of Peat, Marwick. I would say they were understated by a million six, which was the partners' indebtedness to the firm for liquidation purposes.

They were understated by the value of warrants which were carried at a later point at book value, I think, instead of market value. For liquidation purposes they were understated by the value of certain offices of Newburger, Loeb which could be sold as quasi-going businesses,such as the California office, that office for one.

So I would say for liquidation purposes a clear understatement.

Q Are there any other respects in which you state that it was understated?

A I don't know of other respects but there may well be.

Q Do you know that there was realistically no financial capability in the general partners of the firm to make up their deficits outside of the tax refunds which might be available?

A I don't know that to this day.

Q You never heard that at any of the meetings?

A I surely heard it said.

Q And you disbelieved people when they said it?

A I had no reason to believe them or disbelieve them. In the context which I heard it, which was essentially the bak and forth between Arthur Richenthal and Max Freund, considering as I did some things that Max Freund had to say were not correct, I am not sure this was correct.

MR. GRUTMAN: Your Honor, may we have direct answers and not this diffuse --

THE COURT: You as asking what his position was.

MR. GRUTMAN: I didn't ask the reasons for his position. I simply asked if he gelieved or disbelieved and I believe that question and others which I asked can be more directly responded to than to get these expatiations from the witness..

THE COURT: They can't quite be answered as simply as you would seek to do it by the form of your question.

Go ahead.

Q Do you know, Mr. Silverman, as a matter of accounting --

MR. MANDEL: Excuse me, have you finished your answer to the last question?

THE COURT: I will deem that answer finished.

Q Do you know, Mr. Silverman, that it would have been a violation of generally accepted accounting principles to have included the $915,347 as an asset of the firm on the balance sheet until such time as that amount of money was assigned by the partners to the firm; do you know that, sir?

A First I don't know what the acceptable accounting principle would be preparing a balance sheet on an on-going business basis as compared with preparing a balance sheet for a liquidation basis. So I don't know what the accepted accounting principle would be but we were talking in terms of what is available for the limited partners, two of whom I represented. And in terms of real assets that were available, those were available. Whether the acceptable accounting principle would have put them on the paper --

THE COURT: You have answered the question, sir.

MR. BIEHL: Mr. Grutman has been trying to curtail the answers. I certainly move to strike the majority of that last answer.

THE COURT: I will permit it to stand.

MR. MANDEL: Will the Court strike Mr. Grutman's statement that this is unmanageable, Judge. I think that is improper.

THE COURT: The jury will disregard it if they heard it. The management of the Court is within my

Q Do you know that the statement that they prepared was to be disseminated to anybody who wanted a copy of the financial statement?

A That was --

Q And that included limited partners?

A A statement not prepared for the purposes which we have been given information for November, December and early January. I think what you are trying to do is equate apples and oranges.

MR. GRUTMAN: Your Honor, I ask that that comment be stricken.

THE COURT: Strike out the comment about apples and oranges. The rest may stand. Go ahead.

Q Do you know whether or not those warrants were registered or unregistered as of December 31, 1970?

A I think they were unregistered.

Q You know as a lawyer familiar with securities law that unregistered warrants were not tradeable on any exchange; isn't that so?

A That's true.

A And they could not be publicly sold?

A That is true. Publicly sold on an exchange. Could you go to someone and arrange a private sale, yes.

Q Mr. Silverman --

THE COURT: I will permit that answer to stand.

Q You knew they could not be sold publicly until they were registered?

A Couldn't be sold on an exchange, couldn't be what is called a public distribution. You use the word publicly and it may mean one thing to us as lawyers and it may mean another thing to lay people.

Q Mr. Silverman, don't you know that in the case of the warrants that you are talking about there couldn't even have been a private sale of those warrants because private sales were prohibited as a condition of the warrant?

A I don't know that.

Q But if that were so?

THE COURT: Sustained.

Q Assume that was so.

THE COURT: Sustained.

MR. GRUTMAN: I over it subject to connection, your Honor. I will offer proof that was a condition of the warrant.

THE COURT: Will somebody in the room make that representation that is the fact?

Who makes that representation?

MR. SHAW: Mr. Risher.

THE COURT: Mr. Risher, do you make that representation?

MR.RISHER: I do, your Honor.

Q Did you ever look at those warrants?

A No.

Q Are you then saying, Mr. Silverman, that you could ascribe a value to those warrants without ever having looked at them?

A Yes.

Q Now, Mr. Silverman, as I understood some of your testimony yesterday you were talking about things that were not disclosed, among other things; isn't that true?

A That is true.

Q Would you please look at the November 18, 1970 notes which were taken by another member of your firm? It was Exhibit 28-F on your deposition.

A Let me just get these back in order.

(Pause.)

Q Do you have that before you?

A I do.

Q Did you suggest yesterday, Mr. Silverman --

MR. MANDEL: What is the exhibit number?

THE WITNESS: It is M for identification. Additional Defendant Finley Exhibit M for identification.

Q Did you suggest yesterday in your testimony, Mr. Silverman, there was no disclosure at these meetings between November and February of the existence of the possibility of tax refunds?

A There was certainly disclosure of that.

Q As a matter of fact, if you will refresh your recollection if it is required, by looking at Exhibit M for identification, the subject of the tax refunds was discussed at the meeting of November 18th; isn't that true?

A Yes, and it was discussed at the meeting of December 10th, it was discussed --

Q The answer is yes.

MR. SHAW: Your Honor, I object to this.

THE COURT: Mr. Silverman, you have answered the question.

Q At the meeting of November 18th, which is all for the moment I am asking you to consider, Mr. Silverman, not only were these discussed but everyone was advised that the tax refunds were not available, would not be received until the spring or summer of 1971; isn't that true?

A Well, I'd have to read these to find out.

Q I will invite your attention to about --

A I suspect that's true. Spring and summer of '71, right.

Q You know from what you learned at the meeting of

October 18th, 1970 --

A What date?

Q December 18, 1970 that it was said that the firm would be without any capital by the end of the first quarter of 1971?

A No. That was said at the meeting of December 10th.

Q December 10th, yes.

A You said the 17th, the 18th.

Q December 10th, you knew that, correct?

A I didn't know that. That's what was said and I think that was false.

Q And at the time that it was said, who said it?

A I think Mr. Grutman.

Q Was Mr. Grutman a part of the conspiracy that you are talking about?

A No. I didn't use the word conspiracy.

Q When Mr. Grutman was brought in, Mr.Silverman, was he brought in as an expert in liquidation? Just yes or no, if you know.

A I don't know. I know he had experience in liquidating Charles Plohn & Company. I don't know why he was broughtin. There was some discussion at that meeting --

MR. GRUTMAN: I am not asking for anything more, your Honor.

THE COURT: All right.

THE WITNESS: Your Honor, there was a discussion at that meeting that leads me to indicate --

MR. GRUTMAN: I didn't ask you to lead it that way.

THE COURT: Try to be as responsible as you can.

Q Whenever the tax refunds might be available was it not disclosed at the meeting of November 18th that the exchange would not recognize the available tax refunds as good capital.

A That is correct.

Q So that means that Newburger, Loeb's capital problems couldn't be solved by simply including the tax refund so far as the Stock Exchange was concerned; isn't that true?

A I would say so.

Q Did you get to know the partners to whom those tax refunds were coming?

A I don't know what you mean by no. I know some of them are, certainly.

Q Did you know that as married men they had filed joint tax returns?

A I would make that assumption but I did not know that.

Q Do you know as a lawyer --

MR. MANDEL: Your Honor, I am objecting to Mr. Grutman's constant --

THE COURT: Your objection is well taken.

MR. SHAW: Constant cutting off of the witness?

THE COURT: Not cutting.

In the last couple of questions there have been cutting off of answers.

MR. GRUTMAN: I thought I had complete answers.

Q Do you not know, Mr. Silverman, where joint tax returns are filed and refunds are made by the government, the payee of the tax refunds would be not only the partner who was a member of the firm but his wife as well; isn't that so?

A A check is made payable to both but it doesn't mean that any portion of the refund check is the property of the wife.

Q The payees would be both; correct?

A The people that would have to enforce the check and the people to whom the check is payable are both because they both signed the tax return, if it were a joint return.

Q And the wifves, who were not partners of Newburger, Loeb & Company, couldn't be coerced into endorsing the check over to Newburger, Loeb, now could they?

A Legal proceedings could be taken to secure thosetax refunds for the firm. You have phrased the question misleadingly as to whether --

MR. GRUTMAN: Your Honor, I cannot suffer this. This is a professional litigator.

THE COURT: I would have sustained an objection to the form of the question had it been made on the ground that the word "coerced" is an improper word in the question. I think the witness' position is well taken.

Q The wives of the partners who may have had deficit positions in the firm --

THE COURT: This is all speculation what the relationship between the husband and wife may be.

MR. GRUTMAN: If the wife was not the member of the firm the obligation of the husband as a matter of law is not her concern.

THE COURT: Let's say for argument's sake Leo Stern had a tax refund with his wife, what the relationship between he and his wife is. That is speculation.

Q Do you know there was no obligation on the part of the general partners who were going to receive tax refunds to turn the money over to Newburger, Loeb, do you know that?

A Quite to the contrary.

Q Where do you say the obligation exists? Where do you say the obligation exists? Where do you find the authority for saying that there was an obligation on the part of the general partners, and I am only asking you for the source, Mr. Silverman; do you understand my question?

A Yes.

Q What is the source of what you say the obligation is that compels the partners to turn over the tax refunds?

MR. MANDEL: I object to the form of that question. I think it is meaningless.

(Sustained.)

Q Is there anything in the partnership agreement that says that the partners would have to turn over the tax refunds to the partnership?

MR. MANDEL: I object on the ground that that's irrelevant.

MR. GRUTMAN: I hardly think so. This man has taken a position --

present that there was no certainty that the tax refunds were the right of the partnership?

A My recollection was refreshed prior to reading it. It is consistent with my recollection.

Q Then it says by Arthur Richenthal, "If you want the limited partners to voice confidence, the general partners must voice confidence by giving tax refund money to the firm."

Is that correct?

A Correct.

Q Do you therefore remember, Mr. Silverman, that there was discussion among the people present about trying to persuade the general partners to make the tax refund money available to the firm?

A That's correct.

Q Would you turn over to the next page, please.

A Yes.

Q So far we have talked about the problems of getting capital which were discussed at the December 10th meeting; correct?

A Certain aspects.

Q But in addition to the capital wasn't there expressed at the December 10th meeting the necessity for getting management?

A Oh, yes.

Q That is what you wrote down, explicitly, "Must have management. Capital alone won't solve the problem."

A I wrote it there and it is written even earlier. That was a clear requirement of the New York Stock Exchange. They wanted qualified management personnel.

Q Now, would you go over to Page 11?

A How many pages from where we are at?

Q Two pages on.

A All right.

Q Where it says "Muh and Risher called in." Who called Muh and Risher in?

A I don't know but I think it was Mr. Steefel.

Q And he represented --

A Or Mr. Richenthal.

Q And he represented what kind of interests?

A He represented an estate and there were times that he thought he was a subordinated account and times he thought he was a limited partner.

Q If he was a limited partner that meant he was in the same shoes as the people whom you claim to have represented, Bleich and Donoghue?

A He thought he was in better shoes.

Q Muh and Risher called in. "If they can make Newburger, Loeb available and make a million dollars available, they take over and give limited partners in excess of 50 cents on a dollar as capital. Stock in Bacardi Corporation would have to liquidate part or all of stock to provide cash necessary to run the business. They would be acitve management."

That was said at the meeting, wasn't it?

A By Mr. Risher or Mr. Muh.

Q That was said openly by either Mr. Risher or Mr. Muh; right?

A Said it in front of everybody.

Q Is there a note there which you made at that time that anybody objected to Risher and Muh coming in to do what they were asked to do or what they offered to do?

A Your question is such that I can't answer it because there is an assumption of fact in your question which isn't true.

Q Look at the note that you wrote.

A They weren't asked to do this when they were called in.

Q Look at the note which you wrote.

THE COURT: No. This is the one you have read to him. That's been called to his attention. No need for that.

Q Is there a note which expresses the disapproval of anybody for Risher and Muh to provide the million dollars and to give the limited partners in excess of 50 cents on a dollar of capital and to be the active management?

A Neither one way or the other, neither approval or disapproval. They made a proposal at this meeting and then the meeting broke up with --

MR. GRUTMAN: I move to strike.

THE COURT: There is nothing in your notes on that subject about approval or disapproval.

THE WITNESS: That's correct. But I have a recollection.

Q In any event, Mr. Silverman, what Risher and Muh offered to do was expressed by them openly to the people at the meeting; right? It wasn't done in the dark?

A No.

Q You made some mention yesterday about Larry Berkowitz. Do you remember talking about him?

A Yes.

Q Do you know that at the time of the transfer agreement Larry Berkowitz did not have a contract with Newburger, Loeb & Company, Incorporated?

A I don't know one way or the other.

Q The fact that Berkowitz was to be kept on or to be part of the new management, wasn't that also a fact which was disclosed at the meeting?

A Which meeting?

Q The December 10th meeting, the one that you attended.

A Risher and Muh wanted to keep him. Yes, I'd say so.

Q As a matter of fact you made a note of it. Look at the bottom of the page which you have just been reading. "They brought Berkowitz in and they feel he's good in legal and compliance."

That's what you wrote; correct?

A That's what I just said also.

Q So they expressed their belief about the utility of Mr. Berkowitz openly and not in the dark?

A That's correct.

Q Will you turn over to the next page, please.

A Yes.

Q The next to the last paragraph says "In Risher's proposal Fred Kayne will be a part of the equity of Risher. Also Jed Cohen would have stock and part equity."

A "Such a part equity."

Q That's a note that you made of what was said at the meeting by Risher or Muh; isn't that true?

A That is true.

Q And therefore the fact that Fred Kayne would be a part of the active management was a fact which was disclosed to the people at the meeting; true?

A That is true.

Q And therefore Fred Kayne's participation or Larry Berkowitz' participation or Jed Cohen's participation was not something that was being done surreptitiously or in the dark?

A No.

Q At the bottom of that page it says, "Risher and Muh in position to have commitment by tomorrow. They to let us know tomorrow."

Is that right?

A Yes.

Q "Limited partners, $1,950,000 at stake." Right?

A Correct.

Q What did you mean by that?

A I testified to that yesterday. I will repeat my testimony. Limited partners had $1,950,000 invested at Newburger, Loeb. Somebody made the statement, I don't know

A On December 10th --

MR. GRUTMAN: Withdrawn.

THE COURT: Withdrawn.

Q On December 10th did you believe it to be true?

A I just said so. Yes.

Q For how long thereafter did you continue to believe that statement to be true? I am asking for a date and not a speech.

A I am going to try to give you a date.

Q Please do.

THE COURT: The jury will disregard the form of Mr. Grutman's last question and deal only with the merits.

MR. GRUTMAN: I will rephrase the question.

THE COURT: You don't need to. You have gotten it across.

Go ahead.

A Not later than early April of '73 and not earlier than around mid February of '71. That's a long span of time. I appreciate that. But I can't fix a particular time. I suspect it was closer to '71 than '73.

Q Now, Mr. Silverman, do you know what a back office loss is?

A I have heard the phrase and I think I know what it refers to.

Q What does it refer to?

A In Newburger, Loeb's case it referred to the situation where the back office, that is where all the records are kept as to stock purchases, stocks sold, deliveries to purchasing brokers, receipts from selling brokers, are kept. The back office of Newburger, Loeb had literally gone out of control. They were on a manual system at a time when most of the houses on Wall Street were on a computer system. They had a large number of fails, that is, they were showing stock that they were supposed to receive but they hadn't received or stock they had shown delivered that they hadn't delivered. As a result of what I will euphemistically call the back office mess that occurred essentially in 1968 and early '69, there was a large loss sustained.

Q Do you know how large the loss was?

A I think ultimately it turned out to be something around $2 million which sticks in my mind.

Q How much?

A I could check my records but I think around $2 million.

Q How about $2,200,000?

A I think that's right.

Q And that figure --

A That's right.

Q Just a moment.

Doesn't the $2,200,000 back office loss represent a loss incurred including a time period beyond 1969?

MR. MANDEL: I will object to the form of the question.

Do you mean beyond the beginning of 1969?

MR. GRUTMAN: No.

THE COURT: Overruled.

You may answer.

A The loss incurred --

Q The $2,200,000 --

A I can answer the question. The loss was incurred in '69 but a portion of it wasn't recognized on the books until '70.

Q When there was a surprise audit?

A I don't know. It might have been. I don't know.

Q Look at the bottom of the page from which I have just read and did you not write on December 10, 1970, "Back office losses taken in 1970 and attributable to earlier periods what broke the firm. Arthur Richenthal believes that you can prove this is Charles Gross' fault."

Is that what you wrote on December 10, 1970?

A That's what I wrote; that's what he said.

Q Do you have a note of anybody else saying anything to the contrary on behalf of Charles Gross at the December 10th meeting?

A At that meeting, no.

Q Look at the notes of 28-J.

A What meeting?

Q I am not sure what the date is. I think it may be December 30th.

MR.MANDEL: What is the exhibit number?

MR. GRUTMAN: I don't know.

THE WITNESS: 28-J. Were they marked?

Q I don't know whether they were marked or not.

A I don't think they were.

They were marked at my deposition but not identified here or put into evidence.

Could we have them marked for identification?

THE COURT: Let's mark those for identification at this point.

(Defendant Finley, Kumble Exhibit S was marked for identification.)

MR. MANDEL: May I have a look at that for a second?

THE COURT: This whole area in my opinion is of marginal relevance.

In order to save time did you make any application to any Court on any basis prior to this transfer agreement being executed having to do with trying to stop it in any way for any ground?

THE WITNESS: No.

THE COURT: Let's go on.

Q Did you know, Mr. Silverman, that if you had so applied for a temporary restraining order and one had been granted, the transaction would not have been able to go forward on February 11th?

A Yes.

Q And lastly, if in fact the legal position which you had advocated in seeking the temporary restraining order were correct, thatwould have brought up for legal or judicial determination the correctness or incorrectness of the contending positions; right?

A If one could have afforded the bond that had to be posted in order to get an injunction, you would be able to at some point have a judicial determination. But the Court requires that you post a bond and you have to put up collateral for that bond and it means in effect rich people can get injunctions and poor people can't.

I called Mabel and came back to the big meeting and said she was not prepared to make up her mind at this time whether she was going along with deal or not. I sat for a while and heard Paul Risher set forth some financial information. At that point one of the three people said to me, "Arthur, in view of the fact that you can't make a commitment on behalf of Mabel, your presence here would be counterproductive. Please leave."

Q That is what you call being thrown out?

A Yes.

Q Will you look at, please, the first page of Exhibit BBB where you wrote something attributed to Mr. Persky. I am reading your entry. "Persky requires consent of all to bypass Jeanne. Conceded that all signatures were on reliance on one another. Assumes that Jeanne will be paid."

Now, do you recall that Mr. Persky assumed at that time that Jeanne Donoghue would be paid?

A He said he did and he previously said she would be. Said it to me, not at this meeting but earlier.

Q The answer is he did?

A Yes.

Q When Mr. Persky, according to your notes, said "All signatures were on reliance on one another," do you remember what he was referring to?

A He was referring to the signatures on December 31st.

Q Do you recall that he was referring to the fact that the limited partners who had agreed to stay in wanted everybody to stay in and nobody to get out?

A I think that's true but I think the accurate answer is I don't know.

Q Do you recollect that it was the sense of the limited partners that if they were going to stay in, they were all going to stay in and that no one was to get a preferential treatment to get out at a fixed period of time or immediately?

A Not really.

Q All right. Steefel, the next note, "Steefel would absorb Jeanne but not Mabel. Everyone else takes the same view."

When you wrote that, Mr. Silverman, and I read your entry, have I not?

A Yes.

Q Was that what Mr. Steefel said?

A In substance.

Q So that he was agreeable, as was Mr. Persky, to seeing that Jeanne would be paid out?

A Right.

A No.

Q Go over to the next page. It is the page with general partners. You have a listing of capital there.

A Yes.

Q Next to the last page. Who provided those figures?

A Paul Risher -- well, he said the figures. He spoke.

Q And you wrote them down?

A Where he got them from I don't know.

Q You wrote them down?

A Yes.

Q The figure that you wrote down for Charles Gross was $162,734; right?

A Positive. There is a plus sign before it.

Q That was what, Mr. Gross's capital?

A That's what Risher said it was.

Q Okay. There were other people with positive capital as well, were there not?

A Stated to have positive capital, yes.

Q Did they include Robert Therese?

A Yes. On this one he did. It turned out he had a --

A He did.

Q Did all of the other people who had positive capital that I have mentioned go along with the deal, with the exception of Charles Gross?

THE COURT: Isn't this cumulative, Mr. Grutman?

A The answer is --

THE COURT: There is no question, please.

Q Please look at Exhibit FFF.

A What is that?

Q 28-R.

A FFF, yes.

Q What is the date of that meeting, sir?

A February 5, 1971.

Q Between December 31st and February 5th there had been negotiations going on and you had participated in some of them; right?

A Between December 31st --

Q And February 5th there had been discussions going on?

A There had been discussions going on.

Q Had you ever urged during those discussions that the signature of Charles Gross was required on the transfer agreement?

A No.

way Newburger, Loeb was treating her brother Charles?

A I have a problem with that because of the attorney-client privilege. I would like to answer the question.

Q You have already answered it, Mr. Silverman. Didn't you say in the deposition that the principle was she didn't like the way Newburger, Loeb was treating her brother Charles?

A That is correct.

Q To that extent wasn't there an alliance between Donoghue and Charles Gross?

MR. MANDEL: I object to that.

THE COURT: Sustained. I don't know what the word"alliance" means.

THE COURT: Sustained as to form.

Q Didn't Charles Gross control Jeanne Donoghue?

A Not after I met Jeanne I wouldn't say so.

Q Take a look at triple F, the meeting of February 5th. After it says "Steefel introduction," the next thing that appears in your handwriting is attributed to Mr. Mandel. "Mandel: A good working assumption that Jeanne will go along if Charles Gross does."

Doesn't that refresh your recollection, Mr. Silverman, that Mandel acknowledged that if you satis-

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fied Gross, Donoghue would fall into line?

A I think that's a fair statement. If Gross was satisfied Jeanne would not feel her brother was being taken advantage of.

Q To that extent don't you believe that Gross controlled Donoghue?

A It's the word control that troubles me. I can go as far as to say if Gross was satisfied Donoghue would go along. But Donoghue wasn't going along not because Gross controlled her.

Q You remember Mr. Mandel having said blood is thicker than water?

A I don't recall that. It's in the notes of the meeting I didn't attend.

Q In quotation marks. Didn't that indicate to you that the relationship, the fraternal relationship between Mrs. Donoghue and Mr. Gross was such that Mrs. Donoghue would do whatever Mr. Gross wanted her to do?

A No. You keep getting in there the element of control and I can't forego that.

Q The answer is no.

MR. MANDEL: I object to the constant interruption of the witness.

MR. GRUTMAN: I interrupt only when I think the answer has been given.

THE COURT. Proceed.

Q Mrs. Donoghue was in Melbourne, Australia; right?

A She was in Melbourne, Australia.

Q She didn't know anything about Risher, Muh, Kayne, Berkowitz, she hadn't met any of those people, had she?

A As far as I know she hadn't met them.

Q As a matter of fact, had she had any contact directly with Newburger, Loeb from the time she became a limited partner?

A I don't know.

Q Do you know whether she knew anything about the financial affairs of Newburger, Loeb except as they may have been told to her by either you or her brother?

A I don't know.

Q Do you know whether she had an independent basis on which to make an evaluation of the proposed transfer agreement, except as she may have learned about it from either you or her brother?

A I make the assumption that those are the people that would have spoken to her.

Q You know that Gross, he wasn't happy with it; right?

BY MR. GRUTMAN:

Q As a matter of fact, Mr. Silverman, if you satisfied Charley Gross, not only would his sister have gone along but so would Mabel Bleich?

A Yes.

Q And Mr. Mandel said, after stating what I have just read, "It is a good working assumption that Jeanne will go along if Charley Gross does, and if Jeanne does Mabel will."

Didn't he say that at the meeting of February 5th?

A Presumably, yes.

Q And didn't that reflect that Charley Gross was the touchstone to the consent of Mabel and Jeanne?

A Not really. Jeanne was the touchstone to the consent of Mabel.

Q Oh, Jeanne controlled Mabel?

A No. You said the touchstone. I said to you at the beginning Jeanne and Mabel were in different situations with respect to this. And if Jeanne went along, Mabel would go along. If Jeanne didn't go along Mabel said she wasn't going to go along because she said she would be darned if Jeanne would get her money and I will get my money, said Mabel. The assumption was if Jeanne didn't go along she would be paid. Maybel said she just wasn't going to see Jeanne Donoghue get paid and Mabel take some kind of paper.

Q Mr. Silverman, do you know whether Mabel Bleich knew Jeanne Donoghue?

A I assume she did, yes.

Q Were they in contact with each other between December and February?

A I don't know.

Q To the best of your knowledge had they be in touch with each other?

A To the best of my knowledge, no.

Q You knew Mabel Bleich had signed the agreement on December 31st, did she not?

A Yes.

Q And it is a fair statement that between December 31st and February 11th she was in a somewhat ambivalent posiiton? She vacillated?

A No. Well, you say between. From January 21st or thereabouts on, from January 21st to February 1st or 2nd Mabel didn't know. On February 1st or 2nd she said she wouldn't go along because she was not going to see Jeanne get her money and Mabel would not.

Q But on February 10th she signed a power of attorney to enable you to execute the transfer agreement for

Bleich," before a Notary Public.

Have I read the power of attorney, Mr. Silverman?

A You have.

Q Is there anything in the power of attorney as I have read it to you which is conditional?

A Not within the two pages you have read, no.

Q Between February 5th and February 11th were negotiations still going on back and forth between the promoters of the new corporat-on and the interests of Bleich, Gross and Donoghue?

A Well, on the 5th there were. Just Gross. The negotiations were with Phil Mandel.

On the 8th there were. I don't know about the 9th or the 10th.

Q Mr. Silverman, wasn't there an agreement between Gross, Bleich and Donoghue for Bleich and Donoghue to withhold their consent in order to induce the receipt of money on the closing of February 11th, in violation of the agreement and at the threat of the destruction of Newburger, Loeb & Company?

A No, sir.

Q On February 5th, coming back to FFF, after Mr. Mandel disclosed the working assumption that satisfying

Charlie would get the signatures of Jeanne and Mabel --

A Where are you reading from?

Q Top of 28-R. Did Mr. Steefel say, "WE make a deal today or no deal. Charley Gross cash, notes or interest in partnership. Steefel sees no possibility of his getting cash. Many people would resent that he gets cash and others get paper. Limited partners support his getting corporate notes in an appropriate amount and exchange of releases."

Do you remember that being said by Mr. Steefel?

A I have no independent recollection but it is here and I presume he said it.

Q You remember Mandel saying at the bottom of the page saying "Principal objective is a hundred thousand dollars in cash or cash equivalent."

Do you remember Mr. Mandel making that demand?

A I remember that.

Q You remember that ont he next page being followed by a general discussion with Mandel stating, "The central position is the cash."

A The critical question.

Q Do you remember making the following notation attributed to Mr. Steefel out in the margin, "The demand for cash is utterly crucial. Charley Gross is one of 20 involved in this. Each one of them has a personal position. Each of them having their life savings in this. Every person would like cash. From an equity point of view why is Charley Gross more deserving of cash? If no deal he wouldn't have cash, he will only have lawsuits. If he takes Steefel's deal he can do other things on Wall Street. While lawsuits, he can't do anything. If no deal, he's in bad shape. If a deal, he has a livable situation."

Do you remember that being said by Mr. Steefel?

A Yes, I do.

Q That wasn't said by Mr. Persky or anybody from Finley, Kumble, was it?

A No.

Q And the threat of lawsuits, that was something about which Mr. Steefel spoke; correct, Mr. Silverman, at this meeting?

A No.

Q Do you have a notation at this meeting of anybody else threatening Charley Gross with a lawsuit?

A With claims, which to me indicate a lawsuit. The only way you can resolve a claim.

Q Who else used the word lawsuit beside Steefel?

A The actual word lawsuit, I don't know that anybody else used the word lawsuit.

deal New York Stock Exchange will" something or other. Do you see that?

A Yes.

Q You have a line, it says "Mandel:" and something written next to it.

A Right.

Q Then you have "All others" and something written next to it.

A Wait. It is "Mandel" underlined, "All others" underlined.

MR. GRUTMAN: May I hold this up for the ju to see?

THE COURT: Yes.

(Pause.)

Q What you have done is you have written in each of the dramatis personae out in the margin and then you ascribe what was said, beginning with Mandel, all others, Persky, where it says "Present and general partners getting series B preferred may object." Then you have Muh, Mandel, Steefel.

A Then I have "Claims".

Q That claims is not a person, is it?

A It indicates it is another person speaking.

Q That person you remember five years later was speaking. Tell us who it was?

A Persky.

Q When Persky said that the other partners would prefer getting series B preferred stock you wrote Persky's name in the margin. Here you didn't write it in the margin and yet you tell us that you remember after Mr. Steeful said "More likely that the other partners can get a judgment against Charles," and there is an enumeration of claims, and without writing Persky's name you recall those claims were enumerated by Persky and not Steefel or somebody else?

A Yes, sir.

Q How strong is that recollection?

A Reasonably strong.

Q You will agree that immediately preceding the enumeration of the claims --

THE COURT: Yes. Let's go on. That's been established.

Q Do you know the amount of money that had been lost by Newburger, Loeb on the use of partnership funds by Mr. Gross without authorization for trading, particularly in city investing?

MR. MANDEL: I object on a number of grounds. One is that he is assuming a state of facts for which there is no foundation.

our little position is that a refusal to agree to a change in the agreement which exists and a refusal to change their rights under the law, cannot be considered to be a conspiracy.

THE COURT: I understand that.

MR. SHAW: My silence is not to be construed as an acdeptance of that legal principle.

MR. GRUTMAN: There is another matter which the Court should pass upon --

THE COURT: You are not going to have a chance because they are coming through that door in three seconds.

MR. GRUTMAN: It has to do with another witness to be produced tomorrow.

THE COURT: Let's take that at the end of the day.

MR. GRUTMAN: Yes, your Honor.

(Jury present.)

ARTHUR SILVERMAN, resumed.

CROSS EXAMINATION (Contknued)

BY MR. GRUTMAN:

Q Mr. Silverman, returning to Defendants' Exhibit FFF, formerly 28-R --

MR. MANDEL: What is the date of that?

MR. GRUTMAN: Those are the February 5th minutes.

MR. MANDEL: Thank you.

Q After Mr. Mandel made the statement that Charles Gross would rather be dead twice than once and stating we are willing to negotiate a settlement without releases are beneficial to everyone, do you remember Mr. Frank stating that there would be no settlement if Gross gets cash?

A I don't have a present recollection of that but is is here in the notes. It must have been said.

Q In just that language, "No settlement if Gross gets cash"; correct?

A Yes.

Q Do you recollect during the course of the negotiations that was a sentiment which was voiced by other people as well?

A I don't know. I don't know. I'd have to refresh my recollection by looking at the notes.

Q Do you remember Mr. Steefel stating after Mr. Frank said "No settlement if Gross gets cash"; Mr. Steefel said "Where would the money come from?"; do you remember that?

A Yes.

Q Does that refresh your recollection that there was no capability to pay Charles Gross cash?

A No.

Q All right. Mr. Mandel then offered three alternatives; either to drop the deal, to go ahead without Mabel or Jeanne, or to make an arrangement with Mr. Gross; correct?

MR. MANDEL: I object. I object to the statement that Mr. Mandel offered three alternatives because that's not -- the word "offer" is Mr. Grutman's. It is his assertion which is not borne out by the document itself.

MR. GRUTMAN: I will read the document in so many words.

"Mandel: One, drop deal; two, go ahead without Mabel or Jeanne; three, arrange with Charles."

Q Are those exactly the words that you wrote in February of 1971?

A You have read the words that are there, yes.

Q Do you recall that that was what Mr. Mandel proposed?

A I recall with respect to No. 2 there was more to it than was written.

Q The next thing you wrote, "If nothing can be arranged with him, he just as soon see the deal dead. If you are willing to proceed without Mabel or Jeanne and incur liability, you are better off taking care of Charles Gross."

Are those the words you wrote after the three items ascribed to Mr. Mandel?

A Yes.

Q Was the suggestion that you are better off taking care of Charles Gross something which Mr. Mandel also said?

A Yes.

Q Go over to the next page, please. Do you remember Mr. Mandel also stating of Mr. Gross, "He realizes that his claim will be resisted. This isn't good for Charles'good and not good for the corporation."

Do you remember that?

A I have a present recollection of a part of it, but it is all here and you have read it accurately.

Q Let me read the next entry. "Frank stated more collectibility from viable new corporation."

Mandel then stated "Charles Gross will have to collect from the partners."

Mr. Frank then stated "Would Adolphus Roggenburg, who is getting preferred stock, want a deal where Charles Gross gets cash?"

A That's "consent to a deal."

Q "Consent to a deal where Charles Gross gets cash?"

A Those are the words that are there.

Q Adolphus Roggenburg was a general partner with positive capital, wasn't he?

A He had positive capital. I'd have to refresh my recollection as to whether he was then a general partner or a withdrawn general partner. I think he was then a general partner but I'd have to check the records.

Q Then Mr. Mandel said, "Maybe it is not possible. We'd rather have no deal than this one." Is that correct?

A That's what it says.

Q And the income thing is Mr. Steefel said, "How can we reject this?" Right?

A Not quite right. I started to write something and I missed it and crossed out three words and then Mr. Steefel said something.

Q All that appears on the page next to Steefel's name is "How can he reject this?"

A That's correct.

Q Risher then stated, according to your notes, "Trading with Rafkind for Charles Gross."

A According to my notes that is what is written but that is not the whole of what he said.

Q That at least Mr. Silverman, is what appears on the paper?

A That is correct.

THE COURT: Mr. Grutman, may I ask if you are going to continue along this vein, it would be quicker to put the exhibit in evidence and just read it to the jury and be done with it.

MR. GRUTMAN: It is in evidence. I am almost through.

THE COURT: All you are doing is asking him to read what's on the page.

MR.GRUTMAN: I want to be sure he states what appears on the paer is whatwas said.

THE COURT: Does he dispute that?

MR.GRUTMAN: In some instances I think he has but I wouldn't be mucy longer.

Q Do you remember Mr. Mandel stating, "Management made a mistake in sending a letter to Rafkind. The letter sent in in response to a letter for clearance." Do you remember that discussion, Mr. Silverman?

A Yes. He said more but that's there and you read it accurately.

Q What that refers to is that Charles Gross sought a position with Rafkind and Company; is that true?

A As far as I know.

Q But in order for his employment with Rafkind &

Company; is that true?

A As far as I know.

Q But in order for his employment with Rafkind & Company to be approved, Rafkind asked for clearance from Newburger, Loeb?

A I don't have personal knowledge of that but I think that is what happened.

Q When I say clearance, I am referring to permission or consent or no objection from Newburger, Loeb.

A I don't know.

Q There was in the partnership agreement an anti-competition clause; isn't that true?

A Yes.

Q And after Mr. Mandel made the statement which I have just read to you, the next entry which you made five years ago and which you ascribed to Mr. Frank was that Charles Gross insisted on the anti-compete clause; right?

A Yes.

Q And you know from having read the Executive Committee minutes of Newburger, Loeb that it was the decision of the Executive Committee not to grant permission or not to grant the clearance letter in favor of Mr. Gross?

A I have seen that in the minutes. If I could look at the minutes I would be able to state whether there is an erroneous premise in your question or not.

Q I just want to move along. Would you go to the next page, please.

A Yes.

Q On the top of the next page it says "The point" --

MR. MANDEL: Excuse me, it says the name "Risher" appears before what you are reading.

MR. GRUTMAN: I can't see it on mine.

Q "The point, Charles Gross has employment opportunities without capital." Is that what you wrote then?

A Yes.

Q Then Mr. Mandel stated, "If solvent and the partners don't have claims against him, he can get his hands on money relatively quickly." Is that what Mr. Mandel then says?

A That's what it says, yes.

Q Now, you have specifically something which Mr. Persky said because you have written his name in the margin and the next words you write, ascribing to Mr. Persky are as follows:

"Would advise the ~~corp~~oration not to penalize Jeanne and would per her out in the 6-month period."

Is that what Mr. Persky recommended at that time?

A 6-month payout.

Q Pay-out; right?

A Yes.

Q Mr. Mandel then stated "There's the money." Which was responded to by Mr. Steefel, who said "Have Mabel go along, pay out Jeanne and let Jeanne pay Charles," to which Mr. Mandel responded, "Talk about $75,000 payment in six months."

A Comma and something else was said and I didn't get it down.

Q The next thing you have down is Mandel said, "Let's assume Charles Gross persuades Mabel." Right?

A Yes.

Q Go over to the next page, I have only two entries which I want to invite your attention to.

One is by Mr. Persky. You see where it says "Persky says if the firm is successful" --

A You have skipped to the middle of the page. All right.

Q :If the firm is successful, everyone is successful."

You remember Mr. Persky saying that?

A No, but it is here and he must have said it.

Q Now, the next entry, Mr. Silverman, toward the bottom of the page, next to the last entry ascribed to Persky.

A I have it.

Q Mr. Silverman, do you remember Robert Parsky on February 5th stating what you wrote, "The corporation wants no litigation. Everybody should release one another." Do you remember Mr. Persky saying that?

A No, but he must have said it because it is here. You have read it accurately.

Q And does that refresh your recollection that Mr. Persky was not seeking to foment litigation but to make peace?

A It is a loaded question.

Q I didn't ask you what it was.

A I don'tknow that I can answer that question. He certainly wasn't seeking to do the things necessary to achieve peace.. It is one thing to say something; it is another thing to act on what you say.

Q What he said was "The corporation wants no litigation, everybody should release one another."

A That's what it said and youhave read it accurately.

Q Did he say that to you after he had shown you the proposed draft complaint?

A Yes, sir.

Q And as an experienced litigator, Mr. Silverman, you are aware from time to time lawyers will show to their prospective adversaries draft complaints of what will be asserted on their client's behalf in the event that controversies existing between them can't be resolved?

A Occasionally that is done.

Q After Mr. Persky had shown or exhibited a draft complaint he made the statement that the corporation wants no litigation; right?

A That is correct.

Q Then go over to the next page, at the bottom of the page after the conversation is continued, do you recollect that at this meeting Mr. Mandel went out and made a telephone call to his client, Charles Gross?

A Yes.

Q When Mr. Mandel went out to make that telephone conversation do you recall whether the purpose for doing so was to communicate an offer of settlement to Charles Gross?

A My best recollection is yes.

Q Before Mr. Mandel walked out to communicate an offer of settlement to Charles Gross, did he say whether or not in submitting the proposal to Mr. Gross he was going to recommend it?

A He did not.

Q When he came back did he report that Charles Gross had rejected the proposal?

A Yes.

Q And did Mr. Steefel say, "Steefel disgusted, Charles Gross is being a pig?"

A Yes.

Q And you wrote that with two exclamation points?

A Yes.

Q What did that indicate concerning the vociferousness or vituperousness with which Mr. Steefel expressed that?

A It indicated vociferousness.

Q Now, we are almost finished, the last document 28-S; would you look at GGG.

A What?

Q GGG, 28-S. I have it marked GGG.

MR. MANDEL: What is the date?

MR.GRUTMAN: 2/8/71.

MR. MANDEL: There is no GGG.

Q Do you have your notes of February 28, 1971, previously marked 28-S?

A Yes.

Q Has that been marked as an exhibit yet?

A It has not.

Q May I have it, please?

A Yes (handing).

MR. GRUTMAN: I offer this document in evidence as Finley, Kumble Exhibit V.

(Defendant Finley, Kumble Exhibit V was marked for identification.)

MR. MANDEL: No objection.

MR. SHAW: No objection.

(Defendant Finley, Kumble Exhibit V was received in evidence.)

Q These are notes that you made on February 8, 1971?

A Yes, sir.

Q And where did you make them?

A In the conference room of Golenbock & Barell.

Q And Charles Gross was present?

A Yes, he was.

Q And Mr. Persky was present?

A Yes.

Q Then Mandel summarized Gross' position at that meeting; correct?

A Correct.

Q And he stated, "No. 1, Rule 317, perhaps some dispensation. Assumes we can take care of it."

What did that rule relate to?

A My best recollection is that that is a rule of the Board of Governors of the New York Stock Exchange which provides that a person who holds securities or an interest in a member firm may not be associated with or be employed by another member firm. Since it was understood that Charles Gross would not be employed by Newburger, Loeb, they would have to get around Rule 317 if he were to hold securities in Newburger, Loeb and work for another house.

Q The second thing in Mr. Mandel's summary of Gross' position reads as follows:

"In addition to the $75,000 payment re Jeanne, another 25,000 required."

Persky says "Risher, Muh and Kayne personally will pay $25,000 to Gross for all the securities he is to receive. Newborg and Steefel shake heads and indicate 'No'".

Does that indicate that Mr. Steefel and Mr. Newborg objected to Charles Gross getting any money?

A At that early point in the meeting.

Q The next thing Mr. Mandel said was "Once you say Jeanne Donoghue gets $75,000, what is Charles Gross entitled to?"

Do you remember him saying that?

A Yes. I remember a discussion about how much he's owed. I don't remember the precise question.

Q Do you remember precisely Mr. Mandel stating what you next wrote in these words "He thinks that his interest is 250 to $300,000 subject to various writeoffs."?

A I don't recall that. It is there and I don't know whether the he refers to Mandel or Gross. I am assuming it refers to Gross but I don't know.

Q That means that Mr. Gross acknowledged that whatever his capital interest was, whatever he was entitled to was subject to various writeoffs; isn't that what that language you wrote down and ascribed to Mr. Mandel means?

A Yes.

Q And when you speak of writeoffs are you speaking only of losses that had been taken in the partnership, a percentage of which had to be borne by Mr. Gross in proportion to his partnership interest?

A I don't know what Mr. Mandel was speaking of.

Q Do you know whether or not the writeoffs included any setoffs that would be applicable to the computation or accounting of Mr. Gross' interest, whatever it was?

A My understanding is it did not. Setoffs and writeoffs are different things. Writeoffs are an accounting thing.

Q Over on the next page, after the discussion continued further, do you remember Mr. Persky stating, and you wrote --

A Just wait a minute. You could be selective but I would like to read it in between.

Q I am doing the examining at this point, Mr. Silverman.

THE WITNESS: May I read the in between to myself? Is this selecting skipping throughout --

MR.GRUTMAN: I will read the rest of it so there will be no question what the paper says. I don't want your Honor to think that I am in any way giving a false face to this so I will read everything.

THE COURT: Let us just accommodate the witness which is the minimum that he has asked for rather than spend a lot of time in reading it.

MR. GRUTMAN: There isn't much between what I left out, your Honor.

THE COURT: Put your question.

Q Mr. Persky then said, "The $25,000 is not" --

A Hold it, please.

Okay.

Q Before Mr. Persky said what he did, there is a statement which reads "We are apart on, one, how much is owed to Gross; and two, what kind of paper."

The next thing Mr. Persky says "The $25,000 is not on the table unless it breaks the deadlock. It is not designed to be sucked into the sand."

A Yes.

Q Which was followed by Steefel saying, "We don't have time to decide what is owed to Charles Gross; two, the reality".

A Then he wasn't on to say what the reality was. I didn't write it down and I don't recall.

Q Does that refresh your recollection that on February 8th when you attended this meeting you were under the Damocles and threat of being suspended on February 11th unless some plan, satisfactory to the Exchange, was filed?

A You use the word "you." That is referring to what, Jeanne Donoghue, Mabel Bleich, my clients?

Q Everybody.

A The firm was under a threat and you used the word "you" and I don't know that Jeanne Donoghue and Mabel Bleich felt themselves under a Damoclean sword.

Q Did they realize and did you advise them that unless on February 11th a definitive plan properly executed was submitted to the Exchange, the result would be suspension and the end of the business?

A I believed that.

Q Next thing that I call to your attention is what appears on the following page, Present realization of operating losses. Accountants and Exchange insisting on writeoffs. Cancellation of leases, $260,000."

A That was cancellation of lease, the One New York Plaza lease.

Q You mean that cost Newburger, Loeb $460,000 out-of-pocket?

A I don't know what it cost them. I know they said that in November they set up a 411 -- they paid something like -- it was $411,000, part of which was paid and part of which was deferred.

Q But the exchange was insisting on a writeoff of $460,000 as you wrote it?

A That's what it says. I don't think the Exchange was insisting on it but the person who said that, said the exchange was insisting on it.

Q Was that one of the claims being made against Charles Gross, that loss?

A Not quite that way but a claim that was being made against Charles Gross allegedly was that he had been told allegedly by the owner of the building that Newburger, Loeb could buy its way out of the lease for $100,000, and allegedly he failed to tell the general partners of this and allegedly rejected it.

Q Isn't it that the landlord offered to pay Newburger, Loeb $100,000 if it came out of the lease, not simply to buy its way out?

A I don't know. I'd have to look back at the last notes.

Q That's Exhibit R.

MR. MANDEL: May I ask for an instruction at this time that this evidence is not to be considered proof of the truth of any of these assertions but merely evidence that it was said at the meeting by somebody.

THE COURT: I think the jury so understands it.

A My notes indicate that the landlord offered $100,000. That's not my recollection.

Q The notes which I read to you before the luncheon recess was that the landlord offered to pay Newburger, Loeb $100,000 to give up the lease; right?

A I think that --

Q That's what the notes say.

A Let me read the notes. It is not my recollection.

THE COURT: Mr- Grutman, is this important on this cross examination?

MR. GRUTMAN: Yes, sir. I am almost through, Judge. Just please let me finish.

A It is ambiguous. You can't tell. It says "Owner offered $100,000 to let Newburger, Loeb out of the lease."

I don't know whether that was offered to take or offered to give.

Q It was instead of paying 460, they would have only had to pay 360 or they would have been paid $100,000 and not have paid the landlord anything if they offered to give up the lease?

A No. You are stating that as fact and that is just what Mr. Persky had said at that prior meeting. I don't know whether that is a fact or not.

Q But the loss was 460,000 for the lease --

A Can't you take it in parts?

Q No. Read what it says. "Cancellation of lease, $460,000."

A That's what it says.

Q That's what you wrote?

A Yes.

Q "Loss on basketball team, $150,000," is that what you wrote?

A Yes.

Q Was that one of the claims that was being made against Charles Gross?

A A claim was being made against Charles Gross with respect to the basketball team.

Q "Unsecured customer receivables incurred '69 or early '70, $480,000." Was that a claim that was being asserted against Charles Gross?

A No.

Q You see Mr. Persky stating "Charles Gross is getting favored treatment." Is that what you wrote?

A That's what I wrote.

Q Those are the last notes that you made at a meeting beforeFebruary 11th; is that right?

A Yes.

Q Were you advised that the closing was going --

A That's not technically accurate but I think for practical purposes it is. I mean I wrote some time sheets but I guess you don't call those notes.

Q Time sheets are just your billing records; right?

A It is in my own handwriting and there is information on a time sheet which could be treated as notes but I am sure you weren't referring to that.

Q Time sheets are the records which lawyers keep in order to compute bills for clients; right?

THE COURT: Mr. Grutman, do you really want to explore this subject now?

MR. GRUTMAN: The last subject, Judge.

THE COURT: This is something that just popped into your account?

MR. GRUTMAN: No, sir. It was preplanned.

MR. SHAW: If he didn't do it, I was going to.

MR. GRUTMAN: I really did plan to ask it.

Q Time sheets are the ongoing records that you make of the amount of time that you spend in the service of a particular client and periodically you add up the time sheets, multiply it by your billing rate and compute what you say the client owes you; right?

A You compute the time charges which may or may not be equal to what the client owes you. You may charge the client less, more, the same. It is a figure that simply represents time times the regular and normal billing rate per attorney of the firm.

Q And at the present time you told us yesterday there is outstanding and owing to your law firm about

$47,000 from Mr. Gross?

A I think I said $47,500.

Q That represents approximately 4700 hours of work; is that right?

A Represents more hours because the billing rate is not an average $100 an hour at our firm. It may be at your firm but not ours.

Q In excess of 4700 hours?

A Wait. In excess of how many hours? I think it is 470 hours of work.

Q Do you know how many hours of work are represented by the $47,000 presently outstanding, approximately?

A I will give an estimate. I will give a ballpark number.

I would say 800 hours. I calculate 791.

Q That represents a half year of some lawyer's work?

A Not at our firm.

Q Since you know how much is open and outstanding, owed by Mr. Gross to Golenbock & Barell, do you also know how much money Mr. Gross paid to Golenbock and Barell for the services rendered by Golenbock& Barell in connection with representation of him or Bleich and Donoghue?

A Him.

Q How much?

A Let me get it out. I have it. I have a whole breakdown for you.

Q Could I look alongside of you?

THE COURT: Let's get the answer, please.

Q Just give me the total.

A $39,000.

Q So in round numbers the unpaid and the paid portion of what Mr. Gross has paid to Golenbock & Barell is close to $90,000 for your advice and servies?

A 86,500.

Q May I look at that piece of paper?

A Yes, you may (handing).

Q From the document that you prepared more than 50 percent of the bill for the services rendered by you has not yet been paid; is that correct?

A More than 50 percent, yes, that's correct.

MR.GRUTMAN: I have no further questions.

THE COURT: Anyone else?

MR. GLATZER: Yes, your Honor.

CROSS EXAMINATION

BY MR. GLATZER:

Q Mr. Silverman, you testified that you became involved in Newburger,Loeb reorganization on or about

December 10, 1970, is that correct?

A That was the first time I attended a meeting which bore on that subject. I have a hard time adopting at this point the word "reorganization." But December 10th is okay. December 9th was technically the first time when I was given the assignment to go down to the meeting.

Q Have you ever learned to this date of efforts made by Fred Kayne prior to December 10, 1970 to have the partners of Newburger, Loeb assign their tax refunds to the company?

A Yes, I have heard of efforts.

Q How far back do those efforts go, do you recall?

A I think that the first effort he made principally was August 24, 1970 when he -- well, you asked for a date.

Q Do you know of your own knowledge over anything you have learned whether one of the reasons Mr. Kayne resigned on approximately October 6, 1970 was because of an inability to have the partners assign the tax refunds?

A He has so testified in the arbitration proceeding.

Q I think you stated that the day after Mr. Kayne withdrew --

A However, you have the wrong date on when he resigned.

Q What is your best recollection as to the date?

A Well, resigned, he retracted his resignation and then he actually resigned on November 5th. It was a whole back and forth that was going on at the time. So that certain positions could be jockeyed into and taken.

MR. GLATZER: I move that be stricken out, the last statement.

Q You stated the day he made his first resignation in October, Newburger, Loeb increased its space as the Century City's office; is that correct? Is that a correct statement of your testimony?

A I would have to refresh my recollection by taking a look at this.

My recollection is that 's what happened.

The resignation was dated -- allegedly submitted on October 8th. On October 9th the California office was expended by signing a lease for the entire 23rd floor for a period of 15 years.

Q Are you aware, Mr. Silverman, that the Newburger, Loeb lease for the California office was sublet immediately and sublet ever since at a profit and that no additional space has actually be undertaken or used by that office?

A I have heard that testified to. As you know the primary obligor on the lease is the lessee and not the sublessee. Newburger, Loeb on October 9th, 1970, was undertaking an obligation over a period of 15 years. One didn't know what would happen to a sublessee.

MR.GLATZER: I move that be stricken after he answered whether he knew or not.

THE COURT: This is a question of what he knew.

MR. GLATZER: The rest is not responsive to my question.

THE COURT: I will deny that motion.

MR. GRUTMAN: I move that everything after the word "however" be stricken. No request for a legal estimation of what it was legally.

MR. GLATZER: Only whether the space is sublet at a profit since then.

MR. GRUTMAN: That's the fact.

THE COURT: Let me hear the question and answer.

(Question and answer read.)

THE COURT: Strike the last part of the answer out.

MR. MANDEL: Excuse me, your Honor, may I move that if you are striking part of it, you strike it all on the ground that I have heard it testified to merely hearsay.

THE COURT: If you were to object to the question on the ground of form I would sustain the objection to strike the whole matter. Do you so object?

MR. MANDEL: Yes.

THE COURT: The entire answer is stricken. The question is objectionable in form. Go ahead.

Q Mr. Silverman, are you aware Mr. Kayne's wife moved from California to New York on or about November 11, 1970?

A She came to New York and it was some time in that fall period. I don't know what the date was. It may well have been October 1st.

Q Are you aware she had a serious kidney ailment in or about that time?

A Yes.

Q And she saw specialists in November 1970 with regard to this ailment?

A No. But no reason for me to believe it isn't so.

THE COURT: The answer is no.

Q Are you aware that Mrs. Kayne underwent surgery in California on December 14th, 1970 for that ailment?

A No.

Q Are you aware that she eventually passed away from that ailment?

A What was the end?

Q As a result of that ailment that she had in November 1970?

A Yes.

Q Doyou happen to know approximately the date on wich she died?

A I think she died during the course of the arbitration proceedings. I don't know the approximate date.

Q Are you aware that Mr. Kayne and Mr. Sloane withdrew from the partnership effective November 30, 1970?

A Yes.

Q Were either Mr. Kayne or Mr. Sloane at any of the meetings that you attended in December 1970 or January 1971?

A No.

Q Did you communicate with either of them in the writing or orally during any of that time?

A No.

Q Directing your attention to the December 10, 1970 meeting, isn't it true that some people at that meeting said that they would withdraw from the department if Risher and Muh were not kept on?

A It is yes and no. I think there were some limited partners who said they would not further extend the withdrawal notice to withdrawal capital if there weren't somebody that remained that could provide some sort of leadership, leadership in the judgment of the people who were speaking.

Q I am asking specifically as to Risher or Muh.

A My best recollection is yes, there were some people.

Q Mr. Silverman, you testified yesterday that Mr. Risher and Mr. Muh's salary was increased in October 1970. Do you happen to know if salary was paid to them personally or was paid to a corporation of which they were principals?

A Well, I guess it was paid to Risher & Muh & Co., Inc.

Q Would that be a coproration?

A Risher & Muh & Co. I don't know if it was a company or partnership or what it was. Frankly, I don't know who it was paid to. It doesn't surprise me if it was paid to Risher and Muh & Co., Inc. or whatever the name was.

Q Mr. Silverman, do you have personal knowledge of any agreement or understanding between Mr. Persky and either or all of Mr. Muh, Mr. Kayne or Mr. Sloane, that Mr. Persky would be their personal attorney in the matters before this court?

A Just repeat the question.

THE COURT: Put it again.

Q Do you have any personal knowledge of an agreement or understanding between Mr. Persky or the Finley, Kumble firm and either Mr. Kayne, Mr. Sloane or Mr. Muh or all three of them that Mr. Persky or the Finley, Kumble firm would be their personal attorney in connection with the matters of the reorganization, I will call it, of Newburger, Loeb?

A It was stated. I had no reason to believe it wasn't true and I don't know whether that is personal knowledge or not.

Q But you don't know yourself whether --

A I say I don't know whether you call that personal knowledge or not.

THE COURT: Who stated it?

Q Yes, who stated it?

A I think Mr. Richenthal at one of the meetings. At the first meeting on December 10th I think Mr. Freund. And as the meetings wore on as to the 30th, the meetings of the 28th and thereafter, it was just implicit in the conversations and discussions.

Q You never heard it from either Mr. Kayne, Mr.Sloane or Mr. Muh; is that correct?

A I don't think I have.

MR. GRUTMAN: I object to the answer and move it be stricken on the ground it is not binding on Finley, Kumble. Richenthal had no capacity to bind Finley, Kumble.

THE COURT: If it isn't binding it isn't binding, period. Overruled.

MR. MANDEL: I believe there is no issue --

THE COURT: Objection is overruled.

MR. GLATZER: Thank you, Mr. Silverman. No further questions.

THE COURT: Mr. Mandel.

We will take a recess, ladies and gentlemen, for about five minutes.

(Recess.)

(In open court, jury present.)

REDIRECT EXAMINATION

BY MR. MANDEL:

Q Mr. Silverman, before court started this morning did you tell his Honor and counsel that there were some aspects of your testimony yesterday which you felt should be amplified or corrected in the interest o accuracy?

A Yes.

Q Will you please state what those aspects of your testimony are?

A I was asked yesterday whether what I had reviewed in respect of the transcripts and testimony of this proceeding, both at the pretrial level and at the trial level before testifying, and I said I had looked at a few pages, three pages, I think, of Mr. Berkowitz' deposition; I had read the opening statements of you and Mr. Grutman; I had sat in court since I think last Wednesday. I did not recall that I had also read the full deposition testimony of Mr. Kayne and Mr. Sloane. That was one matter.

The second matter was I was asked -- I don't recall the precise question, but I was asked when it was that I learned that the financial statements that I had been given in December and January -- December of 1970 and

January 1971 were false, and I said it was when Exhibit 17 was marked in the arbitration proceeding. I didn't know the date but I have ascertained that date to be March of 1973. But in addition I also received another financial statement that also led me to believe that the prior ones were false and I had not produced that one yesterday, though I did have it with me. I just forgot about it.

It was the balance sheet of Newburger, Loeb, unaudited, that had been attached to the final agreement of February 11, 1971.

Q Now, will you produce that, please?

A Well, I have the whole thing here. I made a copy of those two pages to the agreement. I have the whole agreement. I would rather not rip the whole thing out. But I did Xerox the two pages that were attached to that agreement. That's here.

There is actually -- the heading of this is missing, so maybe you should see the whole agreement.

Is the agreement in evidence? If so, I guess this thing in evidence. Is the full agreement in? Is it in one of those books? It may be there. We could just check it.

THE COURT: Why don't we do that at the end of the day rather than spending time. Can we do it at the end of the day?

MR. MANDEL: We want to go ahead with it from here, your Honor.

THE COURT: I see. Why don't you mark it at this point and go ahead with it.

THE WITNESS: It is in this binder which I think has been marked Y in evidence.

Q Does it have a page number?

MR. GRUTMAN: I believe it is Exhibit 25 in evidence.

MR. SHAW: I put that in evidence before, your Honor. It is Exhibit 25.

Do you want a copy of that, Mr. Mandel?

I am sorry, it is 24.

Q Mr. Silverman, in resonse to questions by Mr. Grutman, I stated that you had reasons to believe that the financial information that had been given to you in December and January and February of 1971 was inaccurate. The information given to you at these various meetings as you testified. Now, will you now explain why in your opinion that information was inaccurate?

MR. SHAW: Objection.

THE COURT: On what ground?

MR. SHAW: The witness has not qualified, your

Honor, as an accountant. I believe it is cumulative. I believe the basis for it is not in evidence.

THE COURT: This came up on cross examination by Mr. Grutman. Overruled.

MR. SHAW: Mr. Grutman did ask the witness what his opinion was, but now for him to give the basis for it when he is not an accountant and I think is going to bring in improper testimony.

THE COURT: Let's see if he gets into areas for which he has qualifications. At this time the objection is overruled.

A I took the October 31, 1970 statement that I received some time in December and that showed a net worth. Net worth simply being total assets minus total liabilities, including in liabilities subordinated accounts, subordinated capital, and that gave me in round numbers $2,400,000.

From that I subtracted the things that had been stated during the meetings to have occurred during October, either stated during the meetings or stated from what one could gather in the next financial statement. For example, there was a write-down of seats in the Exchange from cost to market of $174,000. That was a November operating loss that had been stated to be $170,000. There was a stated loss in the basketball team of $100,000.

There was an increased reserve. Fur uncollectible unsecured customer receivables of $153 and there was the Atlas Realty liability, for $111,000. All of that added up to slightly over a million dollars.

I took that, subtracted it from net worth and that gave me $1,400,000, which is roughly what I thought the financial condition of Newburger, Loeb should have been on one month later.

If youtook a look at the November 20, 1970 financial statement it did have a net worth of $1,350,000, so that those two statements taken together, October and November, showed a net worth of roughly a million four or $1,350,000 as of November 27th.

Now, attached to the final agreement on February 11th there was a balance sheet as of December 31, 1970, and I had learned that there was an operating loss in December. So that the net worth should have been lower --

MR. SHAW: Objection, your Honor, to anything after "I had learned". There was no testimony it was at these meetings. There is no testimony that it was said by any of the parties in this case. For all we know he learned about it by reading it in a newspaper.

I don't object to the testimony up to this point.

THE COURT: I am assuming, Mr. Shaw, this is based upon what was learned by him at these various meetings from the people to whom he testified he got information.

Am I right about that?

THE WITNESS: I learned about the December loss from Mr. Dilger at the Exchange.

MR. SHAW: That is not binding upon any of the parties in this case, your Honor.

THE COURT: The ultimate question here, as I understand it, is whether he says he was given certain information which was variously characterized here as false, inaccurate or otherwise at these meetings, and how did he know that it was such. That's the question.

MR. SHAW: If his conclusion is that it is false and inaccurate because somebody who is not a party to the case said that the asset, instead of being such and such should be less, that's not proof of anything. In fact, it is highly prejudicial. There is no basis for anyone making any conclusion on such a basis. For example, if he said that Mr. Jones said that the asset wasn't set forth, are we to hear that sort of testimony? If Mr. Jones is part of the case and was present, that's something else.

THE COURT: Let's review the bidding. Yesterday Mr. Grutman asked about whether it was contended that certain false financial materials had been submitted to him at these meetings. Am I right about that?

MR. SHAW: Correct, your Honor.

MR. GRUTMAN: I didn't ask that, your Honor. I was impaled on my own sword by the answer that I got.

THE COURT: The answer came in through your examination.

MR. GRUTMAN: Yes, I recall that.

THE COURT: Yes. You then proceeded to ask him in what manner he contended that this information was inaccurately stated.

MR. SHAW: He gave three specifics, your Honor.

MR. GRUTMAN: That is correct, Judge.

THE COURT: And now we are being asked what is the basis for his determination as to this difference in the financial picture.

MR. GRUTMAN: I would join Mr. Shaw in that I think I recovered from the state of stupefaction that I was when I learned this is not a man who professes to be an accountant. If all that he has has been the limited experience which he has testified to, I respectfully submit that isnot a question fo weight but a question of admissibility and I submit that it is not admissible for this man to give us his surmised and hypotheses as to why in his judgment the figures should have been different. Particularly if in part it is based on information he has acquired from other than the sources that he is condemning.

MR. SHAW: Your Honor, the problem of asking a witness what is the basis for your belief is that very frequently you will bring in rumor, suspicion or surmise. That wasn't brought out by Mr. Grutman in his question. Mr. Mandel is now going over it again and it has been made apparent up until this point that the witness is now going to bring in rumor, something that he doesn't have a right to rely on for his basis.

THE COURT: The problem is this was not developed by Mr. Mandel but by Mr. Grutman, either offensively or defensively, however he views it; it was developed by him and I think I am going to have to permit a certain limited amount. So the objection is overruled.

THE WITNESS: So that either taking the October 31st statement adjusted to November 27th, adjusted in layman's language, not accounting language, or the November 27th, there was a net worth of 1,350,000 roughly.

However, the financial statement attached to the agreement which was the financial statement attached on or about February 11 but dated as of December 31st, one month later, something which I didn't see too much later, showed a net worth of $1,877,000, an increase of roughly $500,000.

In my judgment, when I reviewed these, it was inconceivable to me that it was possible for the net worth to have gone up if the financial statements given to me previously were true.

Now, later Exhibit 17 in the arbitration proceeding I saw was the Peat, Marwick closing financial statement for the partnership. This was an audited statement. The first audited statement that I saw.

It showed a net worth of $1,653,000, still $300,000 more than what we had been told in the meetings of December and January.

And if you took yet a further statement -- well, I haven't produced it so I wouldn't go into it. There was another statement that led me to the same result but I haven't produced it.

BY MR. MANDEL:

Q Now, from that date to this have you received any information to lead you to change your opinion?

A None whatever. As a matter of fact --

MR. GRUTMAN: I move to strike anything beyond the answer.

THE COURT:Yes. Next question.

Q Now, a few days ago I started to ask you, Mr. Silverman, whether there came a time when you represented Mr. Gross in connection with a proceeding which was started against him in California; do you recall that?

A Yes, I do.

Q Did there come such a time?

A Yes. We learned --

MR.SHAW: Objection, your Honor, to "we learned".

THE COURT: Yes.

Q I show you a document, Defendants' Exhibit GGG marked for identification, and ask you whether you know what that document is?

A Yes. It is a Xerox copy of the complaint filed against Charles Gross in the California court on February 3, 1971 and served on him on February 8, 1971.

May I putit in a time frame, your Honor?

MR. SHAW: Objection, your Honor. He answered the question what it is.

THE COURT: I will permit him to say.

Is this what the days of the week were?

THE WITNESS: The two last negotiating sessions were February 5th and February 8th. So this thing was filed prior to the last two sessions. We never heard about it until it was served the night of the second negotiating session that was held in my office on February 8th.

THE COURT: All right.

Q Who were the plaintiffs in that action?

MR. GLATZER: We object and [illegible] to strike. I don't think it is responsive to any question.

THE COURT: That's denied.

Why don't you offer it in evidence and it contains its own statement.

MR. MANDEL: I offer it in evidence.

MR. SHAW: On the ground previously asserted I object to the receipt of this document in evidence.

THE COURT: It was discussed the other day and I overrule the objection.

MR. GRUTMAN: All objections are preserved?

THE COURT: It means just so as to every one who objected in our side bar conferences.

(Defendants' Exhibit GGG was received in evidence.)

THE COURT: What else are you proposing to offer?

MR. MANDEL: The judgment of dismissal.

MR. SHAW: Some may be objected to. They should be referred to by document number.

THE COURT: Why don't you mark them separate exhibits for identification and then your adversaries will have a chance to object.

I take it there will be no problem as to authenticity only objection to relevance, competence and otherwise; is that right?

MR. GRUTMAN: Yes, your Honor.

THE COURT: Mr. Rothman, put tickets on them. As you are doing that call out what you are doing and then hand that to Mr. Shaw. I gather there is no objection to the fact that these are authentic.

Am I right, Mr. Shaw?

MR. SHAW: That's correct, your Honor.

THE COURT: Very good.

Mr. Mandel, would you start handing those copies up to your adversaries, please.

MR. MANDEL: Yes, your Honor.

(Pause.)

THE COURT: These are exhibits what?

MR. MANDEL: HHH, III.

MR. SHAW: I object to HHH; I object to III.

MR. MANDEL: JJJ.

MR. SHAW: I object to JJJ, your Honor.

MR. GRUTMAN: Likewise.

MR. SHAW: On the grounds previously asserted.

MR. GLATZER: WE join in those objections.

MR. SHAW: I think this has already been discussed, your Honor.

MR. MANDEL: I have KKK, your Honor.

MR. GRUTMAN: I think your Honor previously indicated that documents of this nature would not be admitted if offered.

THE COURT: No, I think I previously indicated that all I was ruling on was the complaint in California because that was all I had before me.

MR. GRUTMAN: I made an observation concerning matters beyond the complaint. My recollection is that your Honor concurred with the position that I took then, which is in line with my present objection.

THE COURT: How many of these are going to be offered?

MR. MANDEL: Pardon?

THE COURT: How many of these are you going to offer?

MR. MANDEL: The whole bunch. The entire history of the litigation from beginning to end.

MR. SHAW: I object to KKK on the grounds previously discussed. I believe your Honor indicated you would overrule the objection. The grounds are different from the other grounds.

MR. MANDEL: Here are LLL, MMM, NNN, gentlemen.

MR. SHAW: I object to MMM, your Honor; I object to LLL, and I object to NNN, although I think that your Honor has previously indicated he will admit LLL.

MR. GRUTMAN: I think these matters ought not be heard in the presence of the jury and at the side bar.

THE COURT: Mr. Mandel, do you have other matters that are to be covered on redirecct by you of this witness?

MR. MANDEL: Yes.

THE COURT: Let us go forward with those for perhaps some ten minutes and I will reserve decision on these so that I can give them full consideration.

Give me all of the matters MMM. I will reserve decision on these overnight.

MR. MANDEL: GGG is in already?

THE COURT: That is correct.

BY MR. MANDEL:

Q Mr. Silverman, wi-l you describe the complaint raised against Mr. Gross by Sloane and Kayne in California?

MR. GRUTMAN: Objection. The doucment now in evidence speaks for itself.

THE COURT: It does. Sustained.

MR. MANDEL: I will read it in due course then.

Q Mr. Silverman, going to your cross examination now by Mr. Grutman, Mr. Grutman read to you from certain notes regarding the minutes of meetings; is that correct?

A Yes.

Q And he read to you selectively, did he not? He didnot read the entire matters is that correct?

A That is correct.

MR. GRUTMAN: Matters?

Q He did not read the entire papers to you?

A Most specific entries, any particular entry was read in full but there was a selection of entries.

Q And do the entries that were selected by Mr. Grutman fairly represent the entire content of the meetings?

MR. GRUTMAN: Objection, your Honor.

THE COURT: Objection sustained.

Q The purpose of this meeting, Mr. Silverman, was to see if the parties could reach a mutually acceptable agreement; is that correct?

A Yes.

Q These were negotiating meetings; is that correct?

A I didn't think the December 10th meeting was a negotiating meeting in the sense of hard bargaining. That was an informational sort of meeting.

December 17th was a little more negotiation oriented. December 30th certainly was negotiation oriented. That January 20th meeting that I didn't attend I wouldn't speak to because I wasn't there.

The February 5th meeting had really two aspects to it: First, an airing of the views pertaining to Charles Gross, and then it went into some negotiations and then the meeting of the 8th with negotiations, the 8th of February.

Q Now, on behalf of Charles Gross or Jeanne Donoghue or Mabel Bleich -- withdrawn.

The requests of the other persons at the meeting were that Charles Gross and Jeanne Donoghue and Mabel Bleich give up certain existing rights under the existing agreement and under the law; is that correct?

MR. SHAW: Objection.

MR. GLATZER: Objection.

MR. SHAW: That lumps everybody in one big category, your Honor.

THE COURT: Rephrase that.

Q Was it the request of the other negotiating parties that Charles Gross gave up certain rights which he had under the existing agreement and existing law?

MR. SHAW: Objection, your Honor.

MR. ESTERMAN: Objection.

MR. GRUTMAN: Objection.

THE COURT: On what ground?

MR. SHAW: That's a characterization and conclusion and it puts everybody in one great big pocket.

THE COURT: Sustained.

Q At any of these meetings did anybody state to Charles Gross or his representative that he had some kind of an obligation to come to an agreement to change his existing rights?

MR. SHAW: Objection.

THE COURT: Overruled.

A No.

Q At any of these meetings did any of the persons state to Jeanne Donoghue's representatives that Jeanne Donoghue had any kind of obligation to come to an agreement or change or relinquish any of her existing rights?

MR. GLATZER: I object. I would like to make a continuing objection on behalf of Kayne and Sloane who were not at these meetings.

MR. SHAW: It is a broad brush. It assumes in the question that there were existing rights upon the part of Donoghue as well as Gross.

THE COURT: He already said that.

MR. SHAW: Then it is argumentative. It is a rhetorical question.

THE COURT: If there is a question that nobody said that, the fact is in the record and we can go on.

Q Is the same true for Mabel Bleich?

THE COURT: Do you dispute that?

MR. GLATZER: No. I just wanted to make a continuing objection to these meetings on behalf of Kayne and Sloane who were not present.

MR. MANDEL: They were represented by their attorney Persky.

MR. GRUTMAN: Come on now. That is disputed.

THE COURT: That objection is overruled at this point. It may be binding on them, it may not. We will see. Go ahead.

THE WITNESS: Shall I answer the other pending question?

THE COURT: What is the pending question?

I assume it is under the same umbrella as the rest? And there is no dispute that that was said?

MR. SHAW: I am sure it wasn't.

Q Were there discussions with regard to the terms as to which Charles Gross would be willing to change his existing rights?

MR. GRUTMAN: Objection, your Honor.

MR.SHAW: Objection.

THE COURT: I sustain the objection on the grounds of form.

Mr. Mandel, their objection is the word or the use of the words "existing rights".

No objection to what anybody may have said, what Mr. Gross was asked to do is a characterization to which they object.

MR. MANDEL: I thank you for that assistance, your Honor.

Q Did anybody ever say that Charles Gross was under an obligation to sign any proposed agreement that was presented to him?

A The agreement specifically in words excluded him, so the answer is no. The draft agreement on December 30th and 31st and every draft that we subsequently received.

Q After December 30th at the meetings you attended and particularly the meetings on February 5th and February 8th, did anybody say that Charles Gross had some kind, any kind of an obligation to sign an amendatory agreement or a new agreement or a different agreement?

A No.

Q Did anybody say that Jeanne Donoghue had some kind of an obligation to sign an amendatory agreement or a changed agreement or a new agreement?

A No.

Q Did anybody say or suggest that Mabel Bleich had some kind of an obligation to sign an amendatory agreement or a new agreement or any proposed agreement?

A No. There was that discussion on the 28th of January where they told me I was under an obligation to go out and find out what Mabel's position was. But I wouldn't -- the answer is no.

Q At those meetings did anybody ever dispute the fact that Mabel Bleich's capital was 75,000 plus?

MR. SHAW: Objection.

THE COURT: Sustained as to form.

Anybody raise any question about the amount of capital Mabel Bleich claimed to have in the partnership?

THE WITNESS: No.

Q Did anybody raise any question about the amount of Mrs. Donoghue's partnership capital?

A No.

Q Were questions raised with regard to the amount of Charles Gross' capital?

A Yes.

Q And are the areas -- did anybody suggest that Charles Gross did nto have some amount of good capital?

A Nobody made that suggestion.

Q Do you recall the lowest figure that was suggested by anybody at any of those meetings as the amount of Charles Gross' capital?

MR. SHAW: Objection, your Honor.

THE COURT: Overruled.

A I think $169,000 or thereabouts.

Q And do you remember who stated that amount?

A I'd have to refresh my recollection by looking at the notes.

May I do that, your Honor?

THE COURT: If you want him to do it.

Q Can it be done quickly?

A I think so.

(Pause.)

A (Continuing) One such person was Mr. Steefel. That was at the meeting of February 8th. The amount of

$167,000 was mentioned by Mr. Persky on February 5th, twice in the same entry. And the amount of -- roughly the same amount, $163,000 was stated by Mr. Risher on January 28th.

Q Did anybody at any of those moment, anybody present, say those amounts were incorrect and should be lowered?

A No.

Q Did anybody say those amounts were incorrect and should be higher?

Q Yes.

Q Who made those statements?

A At the meeting of the 5th you did, at the meeting of the 8th you did and Charles Gross did.

THE COURT: Mr. Mandel, are you going to be much longer?

MR.MANDEL: No, two or three questions.

THE COURT: Any recross?

MR. SHAW: Yes.

THE COURT: Of any length?

MR. SHAW: Maybe half an hour.

THE COURT: Based on this?

MR. SHAW: No. There was a matter that Mr. Grutman brought out that I didn't cover at all, not related to the churning claim that I'd like to go into, excluding the covering letter.

I am admitting NNN, which is the certification of the Supreme Court, New York County, making it an order of that Court.

MR. SHAW: Against all parties?

THE COURT: At this point Sloane and Kayne in connection with other parties. III, JJJ, I am excluding. I am admitting them in part because of the forthcoming testimony about the litigation that Sloane was going to institute -- I have forgotten the exact language that Mr. Mandel said he anticipated the testimony would show but that is in the record of the bench conference of the other day.

I am admitting it in view of the fact that cross examination of Silverman went into certain expenses that had been incurred, some of which had been paid, some of which had not, and it is clear from the record that a certain substantial amount of those expenses are attributable to this arbitration.

MR. GRUTMAN: May I ask your Honor on what basis the judgment itself is coming?

THE COURT: Which judgment?

MR. GRUTMAN: The judgment which you have admitting. The judgment confirming the arbitration award. That exhibit, with all of its red ribbons --

THE COURT: Will you stipulate then the award was confirmed in Supreme Court, New York County?

MR. GRUTMAN: Yes.

THE COURT: Then I will exclude MNN.

MR. MANDEL: The language of the judgment is important because it refers to the claims. It shows dismissal of the claims of mismanagement, and so forth.

MR. SILFEN: Your Honor, may we be heard, please?

THE COURT: What is the problem with this exhibit besides the ribbons? Do you have a copy without the ribbons?

MR. GRUTMAN: Your Honor, that is a judgment between certain parties, Gross, Sloane and Kayne and not anybody else.

The fact that it comes in as a judgment of a Court has an enormous prejudicial effect, intimating to the jury that there has already been a judicial determination which is some way will be binding on people who were not parties to that litigation.

Your Honor can appreciate the visual effect of seals and ribbons, but even if it comes into the effect that this is a judgment dismissing the claims that were made, I think that the probative value as to issues before you is

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minimal. The prejudicial value is enormous. I strenuously object.

THE COURT: I will go along with that recomm tion. I will accept a stipulation that this was made -- the award of the arbitrators was confirmed and made an order of the Supreme Court, New York County.

MR. MANDEL: At least it is binding on Sloane and Kayne in full. At least the document must be admitted with regard to them.

MR. SILFEN: Excuse me, your Honor. That would only be so if Kayne and Sloane were seeking some affirmative relief in this lawsuit. That that judgment would either be res judicata or something to that effect.

THE COURT: I am not admitting it for that purpose. I must understand the purpose of the offer. The purpose of the offer is to show what was litigated and what was decided as a question of the use which was made of the litigation. That is the purpose of this offer.

MR. MANDEL: And the result is binding on Kayne and Sloane.

THE COURT: You have that in the stipulation that everybody is agreed to here, not having heard any dissenting voices as to the stipulation.

MR. GRUTMAN: Without conceding that it is bindi or proof of any conspiratorial action.

THE COURT: There is a stipulation there is such an order in existence in the Supreme Court of New York County.

MR. SILFEN: Judge, I have been trying to fight my way to say something for five minutes.

As I understand Mr. Mandel's claim with respect to the California lawsuit and the arbitration, it was the timeliness or untimeliness of the institution of the lawsuit which Mr. Mandel's client claims lends to some kind of a conspiracy. That judgment was confirmed in 1975.

THE COURT: I think not only the timeliness, it is the nature of the charges and the disposition of them is something from which a jury could draw the inference that supports Mr. Mandel's position. They don't have to but they could draw it.

Mr. Silfen, having fought his way in here is going to stand here until he hs finished.

MR. SILFEN: If the transfer agreement was issued on February 11, '71 and the arbitration wasn't commenced until eight months after the transfer agreement and the judgment wasn't confirmed until 1975, less than thirt days ago, I don't see, on behalf of my clients, the relevancy of any act that took place beyond February 11, 1971, when the transfer agreement had already been executed.

THE COURT: Mr. Silfen, I can see a jury concluding that Mr. Gross was put to enormous litigation by Sloane and Kayne; that he laid out a lot of money on it. When they threatened him with this he laid out a lot of money and he in fact won. I think that is relevant for them to consider.

I am going to admit it.

MR. SHAW: May I add one brief word?

Your Honor, in my opinion absent proof that the lawsuit was baseless and everybody knew it and it was a vexacious and oppressive lawsuit solely for the purpose of vexing and oppressing, I submit it is irrelevant. It does not fit into the conspiracy theory, which is a conspira not to bring lawsuits but to bring baseless lawsuits.

THE COURT: A conspiracy to harass Charles Gross.

MR. GRUTMAN: No.

MR. SHAW: Bringing claims which are knowingly baseless.

MR. GRUTMAN: When you are sued you are harassed The claim here is that this is without merit.

THE COURT: Let's get by this issue once and for all.

As I understand it, Mr. Gross is going to testify in substance that Sloane said to him if you don't go along with this deal I am going to litigate you into the ground.

Now, a jury could conclude from the filing of a lawsuit containing charges of a million dollars of punative damages, et cetera, et cetera, that this was such a lawsuit and they could conclude from the fact that the lawsuit ended up in Mr. Gross' favor, even more so that this was such a lawsuit.

This is their question, not mine. And being their question I feel these exhibits are admissible and I am going to admit them.

MR. GRUTMAN: I take it that it is the Court's view if somebody has bona fide claims that are not vexatious or meritless, which are purely frivolous, you can, if you are so inclined, and the Constitution and the law gives you the right, to sue somebody to the end of the world. There is nothing wrong with that.

THE COURT: No question about that. You are going to prove that in the four lawsuits that you have in your counterclaim.

MR. SHAW: The burden is on Mr. Mandel to prove in support of his conspiracy theory that the members of this

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alleged conspiracy got together and planned to bring baseles claims against Mr. Gross. This is one of them.

THE COURT: Mr. Shaw, there is evidence in this record from which the jury, in my judgment, could so find.

The first complaint alleged by Newburger, Loeb as a partnership against Charles Gross is an instrument upon which in my judgment the jury could so find. It alleges a charge against the wrong person. It alleges an erroneous statement of the number of transactions, the turnover rate is 40 instead of 10. It has a great number of things of that kind in it which would permit a jury to find that.

MR. SHAW: I am only addressing myself to what I consider the issue to be. If it is a baseless claim and if it has no merit and attorneys could not in good faith believe that it existed and that various people knew it and they all agreed to do that, that is a conpsiracy.

But merely suing somebody that you do not like very much and suing somebody in the heat of some sort of business negotiation, if you could in good faith believe that you had a claim, even though you might not have had all the facts right in the beginning, I think that is not a conspiracy. I think that is a conspiracy to do what you have a right to do.

THE COURT: That is a jury question.

MR. SHAW: I think it is a question of law.

THE COURT: It is a jury question and I am treating it that way.

MR. SHAW: I am mindful of a case which we are familiar with, the Appalachian conspiracy, with thirty people at that meeting who all got together and all took the Fifth Amendment before a grand jury where I was asking the questions.

The government brought an indictment and everybody was convicted of all getting together and taking the Fifth Amendment. On appeal, reversed because they had the right to take the Fifth Amendment and there was basis in the law for doing so.

It is not a conspiracy for everybody to get together and do what they have the right to do. If there is a conspiracy, then the conspiracy is going on right now because we --

THE COURT: You are arguing Mr. Mandel's point of yesterday with regard to Mr. Grutman's cross examination. Are you aware of that?

In any event, Mr. Shaw, I don't dispute that point of law. I think the facts in this record allow these

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which everybody is desirous and eager to do? Now think about that.

In other words, would you be willing to sit as late as 5:30, 6:00 o'clock in the evening? Talk about that among yourselves and then perhaps we can ask you later in the day.

ARTHUR SILVERMAN, resumed the stand, having been previously sworn, testified further as follows:

CONTINUED REDIRECT EXAMINATION

BY MR. MANDEL:

Q Mr. Silverman, you testified yesterday with regard to certain legal fees that have been paid and that are owed by Mr. Gross; is that correct?

A I did.

Q And you also testified with regard to certain proceedings brought by Mr. Kayne and Mr. Sloane in the Federal District Court in California against Mr. Gross, some of which were transferred and heard before a Board of ARbitrators of the New York Stock Exchange; do you recall that testimony?

A I don't recall the latter part of it. I recall talking about the institution of the action in California.

I don't believe I testified as to the transfer of a portion of that action by order of the California Federal Court to the Board of Arbitrators of the New York Stock Exchange.

It wasn't technically correct. It was a stay of the California action pending the arbitration before the Exchange should Sloane and Kayne choose to commence that arbitration.

Q In fact, you testified in answer to questions by Mr. Grutman that Kayne and Sloane did bring such an arbitration and that you represented Mr. Gross and that it was the longest arbitration in the history of the Stock Exchange; is that correct?

A That is correct.

Q And that the determination --

A As of that point it was the longest arbitration in the history of the Stock Exchange.

Q And all of the charges against Mr. Gross were dismissed by the arbitrators; is that correct?

A That is correct.

MR. MANDEL: It is stipulated, is it not, among counsel, that the award of the arbitrators was confirmed by a judgment of the Supreme Court of New York County, Index No. 05452-1975, on the 4th day of June, by a judgment dated the 4th day of June, 1975?

Is that our stipulation?

MR. SHAW: So stipulated with reservation of our rights on the issue of relevancy and the binding nature on the other parties in this proceeding.

THE COURT: Very well.

Q Mr. Silverman, what were the fees and disbursements charged by your firm to Mr. Gross in connection with those proceedings -- I include the California proceedings and the arbitration proceedings and the confirmation of the award on the -- in the Court of the arbitration proceeding?

MR. SHAW: Continuing objection, your Honor.

THE COURT: Go ahead.

A I can't really answer it that way because some disbursements were passed directly onto the client and paid directly by the client, such as reporters fees. And the figures I have are the total fees and disb ursements paid by the client.

That was $65,458.04.

Q And does that sum of $65,000 --

A Wait, please. I'm sorry. That includes fees billed and unpaid. I'm sorry. I think you said actually paid and I would have to do some calculations here to determine how much of the fee --

Q I will withdraw that.

But that sum of $65,538.04 in part paid and in part not paid, is part and parcel of the total legal fees which Mr. Grutman questioned you about?

A Yes. Of the total legal fees of $86,500, of which $39,000 has been paid, of the $86,500 legal fees, $55,000 are legal fees incurred in connection with the California litigation and the ensuing arbitration.

Q Over what period of time did those proceedings extend?

A From February 8, 1971 until the --

THE COURT: There was a determination of the award by the Supreme Court, New York County, in June 1975.

Q Now, Mr. Silverman, do you recall that on cross examination Mr. Grutman asked you whether you as a young and relatively inexperienced lawyer felt that Mr. Ryan as an eminent member of the Bar, a member of the firm of Webster, Sheffield had interposed a worthless churning claim in the answer and set-off against Newburger, Loeb & Company; do you recall that?

A I recall questions in substance like that. I don't recall the precise language.

Q And will you and do yourecall that Mr. Grutman did not ask you or allow you to explain the reasons for your conclusion at that time?

A Yes. I concluded that the claims were meritless and frivolous.

Q Will you explain now why you as a young and relatively inexperienced lawyer concluded that the claim, churning claim interposed by Mr. Ryan, whatever his eminence was worthless and frivolous?

MR. GRUTMAN: My objection is this is repetitious. We had all the rationale behind Mr. Silverman's opinion about the validity of the churning claim when examined on direct.

THE COURT: Is this different than that, Mr. Mandel?

MR. MANDEL: It may be, your Honor. The question was asked, and you remember I asked that Mr. Silverman be allowed to explain why he thought it and I think you said I could go into it on redirect.

THE COURT: If it has been covered on direct examination, then there is no need to duplicate it here.

Q Have your reasons been covered fully on direct examination, Mr. Silverman?

MR. SHAW: Objection, your Honor.

THE COURT: Overruled.

A Well, in pieces and parts, I suppose.

MR. SHAW: Objection to anything further, your Honor.

MR. MANDEL: One moment.

Q Will you please state all the facts which led you to the conclusion that the churning claim was without merit and so judged to be by Mr. Ryan?

MR. SHAW: Objection on the ground this would be cumulative. The witness has indicated he answered and there were only pieces and parts. This is something Mr. Mandel can do in summation and we don't need all these things.

THE COURT: Mr. Silverman, how long would your answer be if permitted to answer?

THE WITNESS: A minute or two.

THE COURT: Go ahead. Overruled.

THE WITNESS: I think that a skilled and eminent lawyer from a firm such as Webster, Sheffield, if he represented a client who had a merit-worthy claim would not wait several years to assert that claim, particula where the damages asserted, when he finally asserted the claim, which with commissions, $75,000 of commissions, was ascertainable at the time Westec stopped trading in 1966.

An attorney such as that would not permit his client after Westec owned and in June of '69 to make a part-payment on the account of 2500 shares of Westec delivered in from the Merrill, Lynch account, which was the equivalent of a part payment of $15,000. He would not say to me that he had substantial 10(b)(5) claims and not say what those claims were and then file an answer and counte claim, nowhere in which is there a mention of 10(b)(5) and throughout which are numerous erroneous statements, exaggerations and inconsistencies.

Finally, I don't think if the claim were meritworthy the customer would continue to deal with, at a later point in time, the registered representative with whom he said he had all these problems.

Finally, the interview of Mr. Jordon on September 15, 1970, confirmed that this was an account in no ways controlled by the registered representative but fully controlled by the customer.

THE COURT: This is the reason for your earlier answer; is that right?

THE WITNESS: Yes.

THE COURT: Go on to another subject, sir.

Q Now, do you recall yesterday that on cross-examination Mr. Grutman asked you to examine Exhibit BBB and to state who had positive capital at the date of that exhibit, and he did not permit you to state the amount of the positive capital.

A It showed a positive capital of $6,940.

Q What was stated about the capital of Edmond Plohn?

A That he had a positive capital stated to us of $8,719.

Q What did the Peat, Marwick statement show?

A It showed a deficit of $6,768.

Q What was stated with regard to the positive capital of Richard Stern?

A Positive capital of Richard Stern was stated to be $85,482.

Q What did the Peat, Marwick statement show?

A A positive capital of $70,422.

Q And how about the positive capital of Leo Stern?

A Leo Stern was stated at that meeting to be a positive capital of $693,906, and on the Peat, Marwick report a positive capital of $673,878.

Q Now, as of the Peat, Marwick report, how many partners were shown as having positive capital, including Charles Gross?

A Four.

Q Will you name them, please?

A Leo Stern, Charles Gross, Richard Stern, and Louis Bracker.

Q Now, of those four, which besides Charles Gross was a partner in withdrawal? Had Leo Stern submitted a notice of withdrawal at that time?

A I don't think any of them were.

MR. MANDEL: No further questions.

RECROSS EXAMINATION

BY MR. SHAW:

Q Will you continue to give us the figures with respect to what you were advised in December of 1970 with respect to the capital account of Charles Gross?

A Advised in December of '70?

MR. GRUTMAN: What is Charles Gross' capital on BBB?

THE WITNESS: The capital of Charles Gross at that meeting -- I was confused because that meeting was in January and you said December.

Q I'm sorry.

A The capital stated to us by Mr. Risher was $162,734 positive, and in the Peat, Marwick report --

Q I have not asked you that yet.

Now, as of January you were advised of this figure by Mr. Risher at a meeting; correct?

A That is correct.

Q Can you recall that meeting, sir?

RECROSS EXAMINATION

BY MR. SILFEN:

Q I believe you testified at the beginning of your redirect by Mr. Mandel about your knowledge and awareness of the California lawsuit and the New York Stock Exchange arbitration involving Mr. Kayne, Mr. Sloane and Mr. Gross.

A Yes.

Q Is it not a fact, Mr. Silverman, that the charge of Mr. Gross which we set firth in a reply which your office prepared against Mr. Kayne and Mr. Sloane was similarly dismissed by the arbitrators and that in the order and judgment confirming that decision, Mr. Gross' counterclaims were similarly dismissed?

A You have equated apples and oranges. The charges made in his reply were not dismissed but his counterclaims were.

Q Was dismissed?

A Yes.

Q And the document which set forth that counterclaim was prepared by your office?

A That is correct.

Q Prepared by you?

A That is correct.

Q Now, without getting into the substance of the arbitration itself, I'd like to run you through a certain chronology about events which took place from the time that the complaint was received on February 8th, 1971, until the date that the order and judgment confirming the arbitration was entered into the Supreme Court in June of 1975, and test your knowledge and awareness of this chronology.

You told us the complaint was received on February 8, 1971, is that correct?

A Yes.

Q Do you know sir, when was the first scheduled date for the closing of the transfer of some of the assets from Newburger, Loeb, the partnership, to Newburger & Loeb, the corporation?

A February 11th.

Q Did you know that the closing had been set for one week before that date and then adjourned to February 11th?

A Did I notknow that?

Q Did you know that the closing was originally scheduled for the last week of January and then subsequently adjourned to the first week of February and then ultimately to February 11th?

A No. What was scheduled for the last week of January was something called a pre-closing, I think.

Q Now, you told us this morning during redirect that

California action which Mr. Kayne and Mr. Sloane instituted was stayed by a California federal court.

A No, I didn't say that.

I said parts of it were stayed and parts of it were dismissed.

Q Let us deal with the part that was stayed.

Could you kindly explain to the jury as a litigator what the word "stayed" means, in very short terms.

A It means as to those claims which the Court ruled were required to be heard before a board of arbitrators of the New York Stock Exchange, those causes of actions would be indefinitely postponed pending an arbitration, and ultimately those causes were also dismissed.

Q Would it be a fair statement to say that at the point of stay Mr. Kayne and Mr. Sloane had two alternatives:

A, discontinue the action in California and not proceed with arbitration in New York; or proceed with arbitration in New York by commencing a proceeding before the New York Stock Exchange?

A They had those two alternatives, proceed through arbitration or take a voluntary dismissal of those causes of action or claims that were stayed.

Q Now, according to documents or notes, what was the date of the stay order in California?

A I would have to look at some of these exhibits which are around here someplace. I don't have copies here.

But there was a long period of time --

THE COURT: Mr. Mandel, do you have the stay order?

MR. MANDEL: I think so.

THE COURT: Mr. Silfen, when you get to a point, we will take our recess.

MR. SILFEN: Right now is fine, your Honor.

THE COURT: We will take our mid-morning recess.

(Recess.)

(In open court.)

BY MR. SILFEN:

Q I believe we had a pending question which I asked you this morning if you could tell me the date of the California stay order.

A September 7, 1971.

Q Can you then tell me, sir, the date, if you know, th the demand for arbitration before the New York Stock Exchange by Messrs. Kayne and Sloane was received by Mr. Gross?

A I don't know. Except I can only say it is dated October 18, 1971. I have no reason to believe it was not received thereabouts.

Q Can you then tell me, sir, just moving along on the chronology the date that the reply was prepared by your law firm and by yourself and submitted to the New York Stock Exchange in response to the demand of Messrs. Kayne and Sloane?

A April 1972 or thereabouts.

Q Yes, Mr. Silverman.

A You say submitted to the New York Stock Exchange.

Q Filed, served.

A That is the date because they have something called a formal submission document which was executed thereafter.

Q Now, as I understand it, Mr. Silverman, you testified that you represented Mr. Gross throughout that arbitration?

A Yes.

Q Can you tell me, sir, if you know, what period of time was covered by those proceedings before the New York Stock Exchange and then tell me, if you know, what time of the day did those proceedings generally begin and what time of the day did those proceedings generally terminate?

A The actual hearing sessions, there were 24 that the -- the first starting on December 11th, 1972 and the final one being held on or about April 3, 1974.

Each of those sessions would start about a quarter to four -- I think a quarter to four and they would run through to about 6:30.

Q Now, at those 28 sessions -- 24 sessions, excuse me, is it a fair statement to say that at substantially all of those sessions either Mr. Kayne or Mr. Sloane or both of them were present?

A That is fair to state.

Q Did you know, sir, during this period of time that these proceedings were going on and the hearings being held at those hours where Mr. Kayne and Mr. Sloane resided?

A In California.

Q And did there come a time during these proceedings to your knowledge that witnesses were called to testify on behalf of Messrs. Kayne and Sloane, without telling us what the witness testified to, just to the fact that witnesses were called to testify?

A Witnesses were called to testify.

Q And is it a fact to your knowledge that at least one of the witnesses called to testify was a resident of the State of California?

A Jeff Coyle testified that he was.

Q Now, as I understand it, a time came when the board of arbitrators of the New York Stock Exchange rendered a decision.

A That is correct.

Q And all I would like you to do is tell me the date that the decision was rendered.

A May 7, 1974.

Q Now, as a litigator, Mr. Silverman, is it not a fact that that decision of the New York Stock Exchange would not have any binding effect until such time as a motion to either confirm or disaffirm that decision was made before the Supreme Court of the State of New York in New York County?

A No , that is not true.

Q Is it not a fact, Mr. Silverman, that in order to implement, to give guts or teeth or enforce that decision a motion would have to be made to reduce the decision or the award to first an order and then a judgment based on the order, yes or no?

A Part of that is yes and part of that is no.

Q Which part is yes?

A The award is implemented as soon as it is rendered in terms of being a decision on the merits between the parties. If, however, there were an award for money or an award for specific performance and one had to implement it by issuing process to the Sheriff of New York County to ask him to go out and attach or levy on assets, that would require a judgment of the Supreme Court of the State of New York.

Q So then I think you said part was yes and part was no. Did you give me both parts now?

A I have given you everything.

Q Is it not a fact that the New York Civil Practice Law and Rules requires that a motion to confirm or disaffirm that decision or award must be made, if made at all, within one year from the date of the rendering of the award?

A Unless extended by court order, yes.

Q Did a time come when your law firm made such a motion to confirm that award?

A Yes, it did.

Q Can you tell us the date that the motion was made by your law firm to confirm that award?

A Well, I can't really because the date a motion to confirm an arbitration award is made is technically the date on which the papers are served on the other party. And since service in this case had to be by personal service because this is a special proceeding under the Civil Practice Law and Rules, I don't recall offhand when they were served.

I can tell you that it was between March 10, 1975 and April 28, 1975, some time in that period.

Q You can tell me that because apparently the notice of petition was dated March 10,1975?

A That is right. And the motion came on to be heard before Justice Fein, on April 28th.

Q As I calculate it that is about a period of ten months after the award or decision came down?

A That is from May 7th to March 10th, yes. That is right, ten months.

Q Did you make that motion, that is you personally?

A No.

Q Somebody from your office did?

A Yes.

Q Pursuant to your instructions?

A Yes.

Q Somebody in the litigation department?

A That is correct.

Q Was the making of that motion in March made at the request of Mr. Mandel?

A No, sir.

Q Was it made at the request of anybody in Mr. Mandel's office?

A No, sir.

Q Was it made by your office as a result of any meetings with Mr. Mandel?

A No, sir.

Q Was the motion made with a view toward the pendency of the trial of this action?

A No, sir.

Q Was there a reason to your knowledge that the motion was not made at any prior date within the one year period beginning May 7th, 1974?

A Yes, sir.

Q What is the reason?

A Lack of diligence on our part.

Q Lack of diligence on your part?

A That is correct.

Q As I recall this morning, you testified something about Mr. Ryan waiting a long period of time to assert a claim if the claim was meritorious, that is, in your opinion a good litigator would not wait for a period of time if he had a meritorious claim.

A Different situation but I so testified.

Q Did you as an attorney or you as a litigator consider a 10-month hiatus between the time the award came down and the time that the notice of petition to confirm that award to be an unusual period of time?

A No.

Q Even though the statute of limitations was one year.

A Correct.

Q At the conclusion of that arbitration proceeding do you recall being supplied with a copy of a document which set forth the legal fees and expenses incurred by Messrs. Kayne and Sloane relating to the California arbitration?

MR. MANDEL: I object. I think that it is entirely irrelevant.

THE COURT: Let me hear the question back.

(Read.)

MR. SILFEN: The California lawsuit and the New York Stock Exchange arbitration.

THE COURT: I would assume if you are offering this for the proof of the facts contained in that submission, which is the only reason I can see you offering it, this is hearsay to this witness.

MR. SILFEN: Your Honor, I am only asking him -- only offering it not for the truth of the underlying statements --

THE COURT: Then it has no relevance. It is irrelevant unless it is offered for the truth.

MR. SILFEN: Your Honor, if your Honor will take it subject to connection there is an issue in this lawsuit of good faith and the question of fees and expenses that Mr. Gross has already talked about through this witness.

THE COURT: I understand that. This witness is not competent to testify what the amounts of the fees are. And this instrument is not proof of the fees as identified by him. This is only proof of a claim of fees.

MR. GRUTMAN: The claim of fees would be something that would be germane.

THE COURT: I take it there are people in this world who are in a position to state what the fees are and I will await that event.

MR. SILFEN: May we have it marked for identification to the extent that Mr. Silverman knows it and then we will get it in at some later time?

THE COURT: I think even his awareness of it -- Mr. Silfen, this is offered for what you want to get in as a fact.

MR. SILFEN: Whether it was given to him in 1974, at the conclusion of this arbitration proceeding.

THE COURT: You may mark it for identification, obviously .

MR. SILFEN: Mark this portion, please.

MR. GRUTMAN: Your Honor, I would like to say that I would represent, knowing what counsel have advised me, that there will come a time in this case when that proof will come in.

THE COURT: I await that time.

MR. GRUTMAN: It probably is we don't get a rounded picture. What hangs out at the moment is just one side of the coin.

THE COURT: Objection sustained.

(Defendant Kayne's Exhibit A is marked for identification.)

Q Mr. Silverman, did a time come subsequent to February 8, 1971 that you became aware of the fact that Mr. Kayne and Mr. Sloane had severed their relationships in toto with Newburger & Loeb, the corporation?

A Yes.

Q Did that awareness come before or after you represented Mr. Gross in the arbitration?

A During.

Q During.

Did you know that Mr. Kayne and Mr. Sloane had terminated their interest and involvement with Newburger & Loeb, the corporation, on February 11, 1972?

MR. MANDEL: It is irrelevant, your Honor.

MR. SHAW: Relevant to the conspiracy and good faith, your Honor.

THE COURT: I will overrule the objection.

Mr. Silfen I cam sure can speak for himself.

A By virtue of an agreement in which the Newburger, Loeb Corporation agreed to hold Sloane and Kayne harmless from any claims by Gross, Mable & Bleich.

MR. SHAW: Move to strike, your Honor.

MR.SILFEN: I am asking Mr. Silverman to fix a date whether he knew on February 11th or as of February 11th, 1972 that Mr. Kayne and Mr. Sloane had terminated their association with Newburger, Loeb, Co., the corporation.

THE COURT: Strike that out.

What is the date?

THE WITNESS: In or about February '72 I would have to say.

MR. MANDEL: I think the answer is they do not terminate their association entirely, your Honor, because they have an ongoing relationship.

MR.SHAW: Then let Mr. Mandel so testify, your Honor.

THE COURT: This gentleman is the witness.

Q You testified this morning as I recall in response to questions of Mr. Mandel about the fees of your law firm that were charnged to Charles Gross. You gave a figure of $65,438 in fees and disbursements for defending him in the arbitration.

A You have the right numbers but you have the wrong things that it is for.

Q Well, why don't you correct me then. Could you tell me how much --

A Let me short circuit it if I can. 68,538.04 for legal fees filed by our firm, a portion of which has been paid.

For out-of-pocket disbursements for reporters fees and other out-of-pocket disbursements and for the legal fees that were paid by our firm and reimbursed to us to the California law firm forthe various court appearances in California, even though our firm prepared the papers.

Q That was the Wyman, Bautzer, Rothman, Kuchel?

A Yes, sir. Our firm did all the paper work in that case. They appeared in court, argued the case --

THE COURT: Mr. Silverman, is this $65,000 involved only in the Sloane-Kayne v. Gross dispute?

THE WITNESS: Yes, sir.

THE COURT: Next question.

Q Can you just tell me by looking at your records how much of that money, how much of that dollar figure was due and owing to your firm as of November 30, 1973, for services rendered by either the California counsel for the work that you did or they did and for services rendered for work that your office did in the arbitration?

A We had not fixed the amount. We said it would be no less than a certain amount, and when the time actually came to render the bill we concluded that we could not bill the matter out for the minimum amount because our time charges were triple that amount. We had said to the Exchange --

THE COURT: You have answered.

MR. SILFEN: I have already showed this to Mr. Mandel and he has no objection.

Q Mr. Silverman, let me show you this letter dated December 19, 1973.

(Defendant Kayne Exhibit B was marked for identification.)

Q I ask you whether or not you are familiar with the content of that letter.

A If you will let me just get my own copy out, please.

The answer is yes.

This letter was later amended and the amendment was also submitted in that proceeding. It was submitted on March 9, 1974.

MR. SILFEN: I offer this as additional Kayne's Exhibit B in evidence, please.

THE COURT: Mr. Mandel, any objection?

MR. MANDEL: I have no objection, your Honor.

MR.SHAW: No objection.

THE COURT: Anybody else have objection?

MR. ESTERMAN: No objection.

(Defendant Kayne Exhibit B was received in evidence.)

MR.SILFEN: May I read it, your Honor.

THE COURT: Yes.

(Defendant Kayne Exhibit B in evidence was read to the jury.)

MR SILFEN: No further questions of this witness, your Honor.

REDIRECT EXAMINATION

BY MR. MANDEL:

Q Mr. Silverman, you were asked by my friend Mr. Silfen whether Mr. Gross' counterclaims were dismissed in the arbitration, and I believe you answered yes.

Will you please read what the counterclaim, Mr. Gross' counterclaim was in the arbitration?

MR. GRUTMAN: No. I object to that.

THE COURT: It is in evidence.

MR. GRUTMAN: I see.

THE COURT: Is it not?

MR. MANDEL: Yes. It is in the reply.

A Well, there is a paragraph at the end. It is not denominated counterclaim but it comes after a series of twelve paragraphs which are in answer to and set forth affirmative defenses to the claim. Then it says the following: "In view of the foregoing facts and the evidence to be presented, I request" -- it is signed by Mr. Gross -- "I request that the statement of claim be dismissed and that this New York Stock Exchange Board of Arbitration assess all costs against claimants and order claimants to reimburse me for all expenses, including attorneys fees, which I have expended and will expend in defense of the claimants meritless and abusive charges."

Q Now, in fact the New York Stock Exchange did assess all costs amounting to some $2,000 against Kayne and Sloane; is that correct?

MR. SHAW: Objection to form, your Honor, unless the word "costs" is defined. That is a misleading term.

THE COURT: Why don't we ask the witness what was assessed.

Q Will you state what was assessed by the New York Stock Exchange against Kayne and Sloane?

A "That the costs, $2,880, be and hereby are assessed against the claimants."

There is no definition of what the costs include.

Q The claimants are Kayne and Sloane?

A Yes.

Q Do you know what the costs are?

A I do not know what the costs are. I assume that they are costs that were fixed by the arbitrators but I don't know what they were.

Q Now --

A Or how they were calculated.

Q What part of the counterclaim was denied?

A That portion of the counterclaim seeking to order the claimants to reimburse Mr. Gross for his expenses including attorneys fees.

Q Now, before the arbitration was concluded, did you tell the arbitrators that you doubted that they had the power to award you those -- award Mr. Gross the cost of your legal fees?

MR. BIEHL: Objection as leading, your Honor.

A Not entirely.

THE COURT: He is going to cure the leading problem by his answer.

Go ahead. What did you say?

THE WITNESS: I said to the extent legal fees were incurred in the California proceeding, that the panel had the jurisdiction to award that on the basis of breach of contract, that there had been a contract between the parties to arbitrate their dispute, that that had been breached by bringing the action in court and the expenses incurred in getting it from court to arbitration was awardabl

As to the legal fees incurred in the defense of the arbitration, I said to the panel of arbitrators that my research the night before had indicated to me that the panel did not have jurisdiction to make that award.

However, I did not withdraw the claim because I did not know but what the Exchange might possibly know of contrary authority beneficial to my client. But as far as I knew I told the panel I did not think they had jurisdiction to make that award. Even though I had previously requested it.

MR. MANDEL: Nothing further.

THE WITNESS: May I speak one thing on this? There is one thing left in the air?

MR. SILFEN: May I just have a few questions of Mr. Silverman?

(Discussion held off the record)

THE COURT: Well, Mr. Mandel, there is one subject matter with which the witness would like to speak to you about concerning an exhibit. He has asked me if he would have an opportunity to confer with you. I see no harm in your conferring with him.

If anyone wants to ask as to the subject of the conference in any question they are at liberty to do so.

MR. SILFEN: I think I know what Mr. Silverman wants to talk about and since Mr. Mandel has not sought to rehabilitate him, I think it is palpably unfair to allow him to talk to him now which is going to elicit another question on this record which Mr. Mandel had no idea of asking.

THE COURT: You may inquire into the subject. In the witness' interest he ought to be able to talk to counsel.

MR. SILFEN: I know what they are going to talk about.

THE COURT: Why don't you come up and listen in.

(Discussion held off the record)

BY MR. MANDEL:

Q Mr. Silverman, after the date of Defendants' Exhibit B which Mr. Silfen has just read into evidence, did your firm send Mr. Gross another subsequent letter in regard to fees on the date of March 29, 1974?

A Yes, we did. Thereafter we sent a bill some months later.

MR. MANDEL: I offer the letter of March 20, 197 as Defendants' Exhibit OOO.

MR. GRUTMAN: Is this the letter he just referred to?

MR. MANDEL: Yes.

(Pause)

MR. MANDEL: While we are doing that, I understand that nobody has objections to the admission in evidence of JJ for identification, S for identification -- that is Finley, Kumble S. -- and Defendant Finley, Kumble Exhibit P, Finley O, Finley M, Finley N and Defendants' NN.

THE COURT: Received.

(Defendants' Exhibits JJ, S, P, O, M, N and NN for identification were received in evidence)

THE COURT: Any further questions?

MR. MANDEL: I am awaiting a response on the offer I made.

MR. GRUTMAN: No objection.

MR. MANDEL: Mark this in evidence.

(Defendants' Exhibit OOO received in evidence)

Q Mr. Silverman, will you please explain what is in Defendants' OOO briefly, if you can, and briefly state what happened to the billing thereafter.

A This was a letter submitted -- given to Charles Gross and submitted by him at the arbitration proceedings for the purpose of updating the prior letter that was just previously read.

The hearings were still going on. The time charges were still mounting, the expenses were still going on and we wanted a more current estimate.

This letter said that our fee will not be less than $33,000 and may be more. This was a letter of March 29, '74.

Thereafter, in the fall of '74, prior to the billing, the matter was taken up in the Executive Committee of the firm and I attended that meeting.

The Executive Committee of the firm concluded that there was such a difference between the time charges of the firm and the $33,000 figure, that we could not and would not bill the matter out at $33,000.

And on November 15, 1974 a bill was sent which included $55,000 for fees on this matter.

Q Was that bill still substantially less than normal time charges?

A Yes.

MR. MANDEL: Nothing further.

RECROSS EXAMINATION

BY MR. GRUTMAN:

Q Mr. Silverman, in the December 19th letter that the head of your firm, Mr. Golenbock, wrote to Mr. Gross, in the next to last paragraph on the first page it says, "In view of the extended proceedings, the unanticipated efforts extended by us on your behalf, our prior relationship and other circumstances, it has been agreed that our final fee will be substantially less than time charges."

Were the other circumstances, Mr. Silverman, the expectation that your firm would be paid more than the amount asked for in this letter if Mr. Gross was successful in this litigation?

A No.

MR. GRUTMAN: Thank you.

RECROSS EXAMINATION

BY MR. SHAW:

Q Is it in fact true a substantial portion of the services rendered by you in relation to this case were rendered after February 11th, 1972?

MR. MANDEL: Which case?

MR. SHAW: This arbitration proceeding.

A Yes. Prior to February 11, 1972 was the motion in California.

MR. SHAW: No further questions.

RECROSS EXAMINATION

BY MR. SILFEN:

Q Mr. Silverman, you indicated on the eve of the award or some time before that you came forward and told the arbitrators that you didn't think they had the power or the jurisdiction to award counsel fees for some aspect of the proceeding; that is, I think you said they could award counsel fees for something to do with the services rendered in California, related to some breach of contract but you didn't think they had the power to award counsel fees for the services rendered in the arbitration proceeding.

A Shall I read it to you? I have the transcript of exactly what I said.

Q Is that a fair statement, what I just said to you?

A That is pretty fair.

Q Did you do any research to prepare the reply to find out whether or not the New York Stock Exchange had the jurisdiction power or authority to award the successful party counsel fees?

A No.

Q Notwithstanding that you asserted the claim anyway for counsel fees?

A We believed they did. When we did the research the night before my closing statement we found that we were erroneous about that and we wanted to bring that to the attention of the board of arbitrators so they would not believe they had jurisdiction to do that which they did not have jurisdiction to do.

Q My question was did you do the research before you prepared the reply?

A I answered that.

THE COURT: He said no.

Q You asserted the claim anyway?

A Believeing that they had the jurisdiction. We were erroneous in that view.

Q Did you think that the forwarding of the claim or the presentation of the claim, even though it turned out later that you were erroneous, was specious or spurious at the time that you advanced it?

A No.

MR. SILFEN: Thank you.

THE COURT: Anything further?

RECROSS EXAMINATION

BY MR. GRUTMAN:

Q Did you just tell Mr. Silfen that you were in error about a legal position which you had originally taken with the Stock Exchange?

A Yes, sir.

Q Nevertheless, Mr. Silverman, when you adopted the erroneous position you did it in good faith, didn't you?

A That is correct.

Q And lawyers sometimes do that, don't they?

A That is correct.

MR. GRUTMAN: Thank you very much.

THE COURT: Mr. Silverman, you may step down.

(Witness excused)

THE COURT: Who is your next witness?

MR. MANDEL: Next I am reading from an affidavit and deposition testimony of Alex Aixala, one of the additional defendants on counterclaim.

I have some exhibits and a little bit of a deposition of Richard D. Stern.

MR. GRUTMAN: Your Honor, Mr. Mandel asked me to produce my partner, Herbert Roth, as the next witness

THE COURT: All right, we will do that.

MR. MANDEL: I would like to go ahead with Stern now --

MR. GRUTMAN: Which Stern?

MR. MANDEL: Richard D. Stern. I am laying a foundation. One of the additional defendants on counterclaim --

THE COURT: The deposition was taken when?

MR. GRUTMAN: January 24, 1974, your Honor.

THE COURT: Go ahead. Your Honor should have one in that pile.

THE COURT: Why don't you just start. Go right ahead and begin. Mr. Stern being duly sworn.

MR. MANDEL: Page 15, line 19 --

"Q Did you ever attend any meetings at the offices of --

"A Concerning the sale or future business?

"Q Yes.

"A I can recall one meeting there involving -- it was a partnership meeting. It was early December of 1970 and it was a fairly lengthy meeting.

"Q Who called that meeting?

"A Fred Kayne, who was one of the partners at the time."

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I am skipping.

Then Mr. Roth said something.

"I would like to state there is a copy of that notice and handwritten notes made by him with respect to that meeting that have been produced" --

MR. SHAW: Objection to colloquy. What is the reason for colloquy on this occasion?

Would you pass on that?

MR. MANDEL: This is a case where the attorney is identifying the document.

MR. SHAW: I think the Court can look at the colloquy and make its own mind out. Ordinarily we have been leaving out colloquy.

THE COURT: You wish to introduce those notes?

MR. MANDEL: That is right.

THE COURT: Then the attorney is representing that those notes exist and have been produced and I assume has identified them on behalf of his client.

So the colloquy is appropriate.

MR. MANDEL: Mr.Roth said -- "I would like to state there is a copy of that notice and handwritten notes made by him with respect to that meeting that have been produced for you today. I saw the notice and I don't remember who sent out the notice. In the interests of expedition if he has those notes it would be helpful to everyone. I said I appreciate that. Mr. Roth said that they are handwritten notes and there is a little sheet. I said fine, I will check on that."

There was a discussion off the record.

Then I said to the witness, "I understand that you have produced a notice of that meeting plus some separate handwritten notes which you made in connection with that meeting; is that correct?

"A Yes.

"Q May we have the notes of the meeting March 5th, Exhibit 85 for identification?"

In connection it will appear this means notice.

MR. GRUTMAN: I object, your Honor.

THE COURT: Gentlemen, let's look at 85 rather than playing games down here amongst each other.

MR. GRUTMAN: I am not playing any games. I don't know what he is talking about. He wants to interpolate and I cannot accept that without the document.

THE COURT: In context it sounds like it is not notes of this deposition.

MR. MANDEL: "Whereupon, handwritten notes

> of a meeting were marked Defendants' Exhibit 85 for identification."

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"Mr. Roth: Let the record show the witness isproducing sheets of paper captioned 'Partners Meeting at Finley, Kumble, September 3, 1970,' and that consists of sheets of paper numbered 1 through 11, with that sheet of paper being numbered 11 being completely blank except for the number 11 thereon.

"Mr. Mandel: Let's throw that away as though it never existed.

"Mr. Roth: By agreement, I am taking page No. 11, showing it to Mr. Mandel and discarding it.

"Will you mark that as Plaintiffs' Exhibit 86 for identification?

"(Whereupon, sheets of paper captioned 'Partners Meeting at Finley, Kumble, September 3, 1970' was marked as Defendants' Exhibit 86 for identification)

"Q May I see Exhibit 86?

"A Yes.

"Q Mr. Stern, I have handed you a small piece of paper which I found among the papers you produced today and ask if you can identify that piece of paper?

"A Yes.

"Q What is that?

"A It's a piece of paper that I found with these other notes which was apparently made at about the same time as the notes of the September 3rd meeting.

"Q Is that your handwriting?

"A Yes.

"Mr. Mandel: Will you mark the paper as Defendants' Exhibit 87 for identification."

It was so marked.

"Q I am going to ask questions with regard to Exhibit 87 for identification.

"Is it your best recollection that Defendants' Exhibit 87 for identification was written by you after the meeting rather than at the meeting?

"A I can't figure it was written before the meeting, but I don't know.

"Q You are not certain?

"A No."

I stopped at page 19, line 5.

I now offer 86, the documents marked 86 and 87.

THE COURT: Give them new numbers, please. Give them new tags.

(Defendants' Exhibit PPP is marked in evidence)

THE COURT: That being what?

MR. MANDEL: Formerly 86, your Honor.

THE COURT: I take it Mr Aixala was under oath at that time?

MR. MANDEL: Yes, your Honor.

Page 10.

MR. SHAW: I am going to object to anything on page 10, your Honor.

MR. MANDEL: I am starting with page 10, line 25.

MR. SHAW: I am going to object to page 10, line 25 and thereafter.

MR. MANDEL: Your Honor, I an an extra copy. We may facilitate it that way, which I will give to the Court.

MR. MANDEL: I propose to read page 10, line 25 to page 11, line 16.

THE COURT: What is the problem with that, Mr. Shaw?

MR. SHAW: I believe that it is irrelevant. It is after the facts alleged, and whether or not that relationship existed or not is totally immaterial.

THE COURT: Overruled.

MR. MANDEL:

"Q Mr. Aixala, has Mr. Robert S. Persky ever acted as your attorney in any matter?

"A Yes.

"Q What matter or matters?

"A Represented me on Newburger, Loeb and W.E. Hutton.

"Q When you say Mr. Persky represented you in Newburger, Loeb, what do you mean? Can you elaborate on that a little bit?

"A Yes. He represented me to become an investor in Newburger, Loeb.

"Q During what period did he represent you in that matter?

"A '70 to '73, '74.

"Q From 1970 until 1974?

"A Yes."

Now, I go to page 14, line 4 to 20, line 9.

MR. GRUTMAN: Your Honor, this is the five minutes that Mr. Mandel told us before lunch he was going to take and there is Mr. Rothstill at the back of the courtroom and we have not read anything of the Stern deposition and we have not read anything from Exhibits 86 and 87, or whatever they are called in this trial.

THE COURT: I think he said fifteen minutes. Then it has been a little longer than that.

MR. MANDEL: I may be off on that. I'm sorry.

THE COURT: Go ahead.

MR. MANDEL:

"Q After that first meeting with Mr. Persky, did there come a time when you had a conversation with Mr. Persky relating to Newburger, Loeb & Company?

"A He mentioned to me about investing in a brokerage firm. I do not recall if the name Newburger, Loeb was brought up or not.

"Q When was that mentioned to you?

"A It was -- my guess would be September, October of 1970.

"Q Was that an oral conversation between you and Mr. Persky face-to-face or a telephone call or what?

"A It was person to person.

"Q Person to person where?

"A In a restaurant.

"Q In what city?

"A New York.

"Q Do you remember the name of the restaurant?

"A No.

"Q What was the purpose of that meeting between you and Mr. Persky?"

There was some colloquy which I am skipping between counsel.

"A The exact purpose of the lunch I don't remember but I was here in New York with Mr. Kaplan and we went out to lunch with Mr. Persky, Mr. Kaplan and myself. And sometime during the lunch and on the way back to the office he mentioned about the possibility of investing in a brokerage firm, if I would be interested.

"Q Did you make any response?

"A I said that I might be interested.

"Q Was that all that was said on the topic that day?

"A As far as I can recall.

"Q When did the question come up again at a later date?

"A A later date.

"Q About when?

"A I don't know. A week later, two weeks later.

"Q What happened then?

"A Well, the same thing. There was a possibility of investing and it wouldbe a good investment.

"Q Was this another lunch date?"

There was some colloquy. Then I goto line 20:

"Q Where did that conversation take place?

"A Probably in New York.

"Q Was it a face to face conversation?

"A Probably.

"Q Did you ask at that time for more information about the investment?

"A I don't believe so.

"Q Did you have any later conversations with Mr. Persky ?

"A Probably did.

"Q What happened?"

MR. SHAW: Objection, your Honor.

THE COURT: What is the basis for the objection?

MR. SHAW: It seems to me, your Honor, this falls within the area that I talked about late yesterday afternoon. I think that it is an effort to get into a collateral issue, to impeach the affidavit which has been read in evidence. It is well after the fact and I think that any proof with respect to any inconsistency in the affidavit and in the testimony is totally irrelevant. It is certainly binding upon anybody else and it is inadmissible

THE COURT: I think Mr. Mandel is going in to a series of steps in the preparation of the affidavit, and it is that towards which he is directing his attention, not so much that. It is that, from the circumstances of its preparation, that he is going to ask the jury to draw certain conclusions from; is that right?

MR. MANDEL: Yes. I will make it admissible against other people.

THE COURT: Therefore, I will overrule the objection.

MR. MANDEL: I am going back.

"Q Did you have any later conversations with Mr. Persky?

"A Probably did.

"Q What happened?

"A The same thing. In other words, he asked me if I would be interested and I said that I would be interested provided that it was a fairly safe investment and the --

"Q Go on."

There was some colloquy between counsel.

"Q Will you complete your answer, Mr. Aixala.

"A Go back to the same thing. He has to ask me the same thing and the train of thought I don't know what I was going to say.

"Mr. Mandel: Read back the question and the answer.

"A A safe investment and that it would be a good return.

"Q That is all that happened at that conversation?

"A Probably. I don't recall each and every one conversation.

"Q Did there come a time when Mr. Persky gave you any specific details about the proposed investment?

"A Well, it would be generally saying that it would be an investment; that I would receiving the dividends from the stock that I was to put up; that I would receive interest on the amount of money; and I would get participation in the firm.

"Q And when did he give you those details?

"A Sometime during November and December of 1970.

"Q When did he, if ever, tell you that the investment was to be in Newburger, Loeb?

"A Somewhere in November and December.

"Q Are you able to tell me in your own words the sequence of events between the first time Mr. Persky revealed to you that the proposed investment was in Newburger Loeb and February 11, 1971?

"A Well, he mentioned to me a few times about that investment; that he knew the people involved; that he thought they were capable; and that they could turn the firm around; and that in his opinion it would be a good investment; and the risk would be minimal. And I just kept on working until the time that they called me to come up and meet with the New York Stock Exchange.

"Q These conversations you have just described with Mr. Persky, were those a series of conversations again, say in November of 1970?

"A Yes.

"Q Were the conversations face to face or on the telephone or some each way?

"A I would say most of them would be face to face. Some he might have called me to ask me something. I don't recall.

"Q When would you say it was that youwere called to come to New York and meet the New York Stock Exchange?

"A December.

"Q Can you place it any more closely than that? What part of December, if you are able?

"A I would say the middle but I don't know."

I now go to Page 26, line 16: [illegible].

"Q At what time, if ever, did anybody ever speak to you more specifically about the details of your proposed investment?

"A Probably sometime in January '71.

"Q Who spoke to you then?

"A Mr. Persky.

"Q Was that conversation person to person or on the telephone?

"A I would say it was person to person.

"Q Where did it take place?

"A Probably in his office.

"Q In Manhattan?

"A Yes.

"Q Did you come to New York specifically on that occasion for that purpose; that is, to talk with Mr. Persky about the proposed investment, your proposed investment in Newburger, Loeb?

"A I don't believe so.

"Q You were in New York on other business?

"A Probably.

"Q Getting back to the conversation you had with Mr. Persky in his office, what did he say and what did you say?

"A I don't know exactly but he mentioned that I had put up the stock; that I would receive the dividends from Bacardi; and that I would get a certain percentage of interest for the amount of stock. I don't believe he told me exactly what amount it was at that time, and I would get some share in the business.

"Q You said, am I right, that Mr. Persky told you

you would get some shares in the business. What do you mean when you say the business?

"A Where I was going to invest.

"Q The new corporation?

"A The brokerage firm.

"Q Did Mr. Persky tell you that a new corporation was going to be formed to conduct a brokerage business under the Newburger, Loeb name?

"Mr. Shaw: Are you referring to January 1971?

"Mr. Mandel: Yes.

"Q At that time or prior thereto.

"A I don't believe so. If he ever told me they were going to incorporate it, at one time he might have mentioned they were going to incorporate because the possibil of taking the company probably at a later date."

Can we agree this is a reporter's mistake, the possibility of taking the company public at a later date?

MR. SHAW: I can't recall that.

MR. MANDEL: It says "because of taking the company probably at a later date.

"Q Can you place the time when he told you the business would be incorporated?

"A I really don't know.

"Q To the best of your recollection was that before this meeting in January or during this meeting in January that you have told us about?

"A I really don't know, I really don't know.

"Q He told you you were going to get some shares of stock in the business.

"A Yes.

"Q Yes?

"A Yes.

"Q Did you then understand that if you would have shares of stock it would have to be a corporation?

"A Of course.

"Q So is it fair for me to say that at least by that meeting in January you knew this would be a corporate form of business?

"A Well, I didn't know if it was an existing corporation or a new corporation. I don't know. He just told me shares."

I now go to page 27, line 11.

"Q By the way, up to that moment in January, and I am now talking about the discussion you had with Persky in his office, had you met anybody besides Mr. Persky in connection with the proposed deal?

"A Yes.

"Q Whom had you met?

"A Paul Risher.

"Q Anybody else?

"A No.

"Q When had you met Paul Risher?

"A The same day that I came up for the New York Stock Exchange."

I now go to page 29, line 25.

"Q Mr. Aixala, have you brought any files or papers or documents with you here today?

"A No, I have not."

Your Honor, may I interject to explain that Mr. Aixala was brought here from Florida at our expense for this deposition under a paper that required him to bring all relevant documents.

So stipulated, Mr. Shaw?

MR. SHAW: I don't recall that.

MR. MANDEL: Will you take my representation?

MR. SHAW: All right.

MR. MANDEL:

"Q Have you brought any papers or documents with you here today?

"A No, I have not.

"Q Are you aware that you were requested to bring all relevant papers here today?

"A I don't have any.

"Q Pardon?

"A I don't have any.

"Q Did you ever get a letter from Mr. Persky in connection with this deal?

"A Yes.

"Q When?

"A Sometime in '70, '71, and so on.

"Q What happened to those letters?

"A Most of them I threw away.

"Q Did you save any?

"A I don't think so.

"Q Did you ever get a contract?

"A Yes, I did.

"Q What happened to the contract?

"A I knew them away.

"Q When did you throw away the contract?

"A Probably, you know, as soon as they were -- I mean, I never got the original, I got copies.

"Q When did you throw away your papers? When did you throw away your papers? "

I don't know whether I said it twice or the reporter did it that way.

"A A long time ago.

"Q Did you ever get any financial statements concerning this investment of yours?

"A Before the investment or during the investment?

"Q Before or during.

"A Yes, I did.

"Q What happened to those papers?

"A I threw them away.

"Q When did you throw them away?

"A A long time ago."

I will now go --

MR. SHAW: I think you should continue reading. That is totally out of context.

MR. MANDEL: You will have your turn, Mr. Shaw.

MR. SHAW: Your Honor, could the Court look at page 31, the balance of this page and read it to determine whether or not this should be read in at this point?

THE COURT: How much of this are you going to want?

MR. SHAW: Just the reference to the big book.

(Pause)

THE COURT: Mr. Mandel, why don't you read the answer on line 20 through 23; all right?

MR. MANDEL: All right.

Skip down to 20?

THE COURT: "I remember getting a big book that I still have."

That's what you want, Mr. Shaw?

MR. SHAW: Yes.

MR. MANDEL: I think I have to go to the questions before that in that case.. I may as well just continue.

MR. SHAW: Line 14.

MR. MANDEL: Line 14.

"Did you throw them away before or after March of 1971?

"Mr. Shaw: Are you referring to papers he received prior to March of '71?

"Mr. Mandel: Any papers he threw away.

"A I don't recall getting so many papers before March 31, 1971. I remember getting a big book that I still have, a big book with all of the -- and that is the only one I remember receiving that I have kept."

MR. SHAW: Could we continue?

THE COURT: I think that is enough.

MR. SHAW: The next sentence, your Honor:

"Q What was the big book that you received?

"A It was everything about Newburger, Loeb, the transaction, everything."

That is all I need.

THE COURT: Go ahead, Mr. Mandel.

MR. MANDEL: It is in the record.

I now go to page 36, line 3:

"Q I would like to get back to the January meeting between you and Mr. Persky which you have already told us about and ask you whether in that meeting you definitely agreed to a specific deal.

"A I don't believe so because I told Persky that it was up to him to get the best deal possible. That would leave it up to him to decide exactly what I should get. The only other thing that could have happened in that meeting was the number of shares I was supposed to put up of Bacardi stock and I did not have sufficient.

"Q Did he mention a number of shares that you were supposed to put up?

"A I believe so.

"Q What number did he mention?

"A I had 8,000 shares.

"Q What number did he want?

"A He wanted 8,000. It was about a million dollars. And I did not have the full 8,000 free. I had some as collateral for a loan.

"Q So what was the discussion about that problem?

"A That I cannot have the complete amount of shares.

"Q What did he say?

"A That he would talk to another lawyer there about putting the difference of the shares to complete the transaction, and when I have, when I got free those stocks I would substitute it.

"Q Did he name the other lawyer who would put it in, the additional shares?

"A You mean at that meeting?

"Q Yes."

MR. GRUTMAN: Could we approach the side bar a moment, please?

THE COURT: Yes.

(At the side bar)

MR. GRUTMAN: Your Honor, we have three of the four litigation partners sitting in this courtroom. There has to be somebody back at the store. Mr. Mandel said he had a few minutes and no more than fifteen. It is now 3:00 o'clock.

Mr. Roth has rearranged his professional schedule I understood what Mr. Mandel would read from the Aixala deposition was some kind of backdrop to explore with Mr. Roth briefly, in relationship to an inconsistency in the affidavit.

It is a long tedious reading of the Aixala deposition which he may have a right to do at another time.

I ask the Court out of the presence of the jury in the interest of decorum to go on with the examinatio of Mr. Roth now.

MR. SHAW: If there is any part relative to Mr. Aixala, why doesn't he read it in the deposition of Mr. Roth.

THE COURT: In terms of the time schedule here, they are right. He had been brought in about mid-morning. You had hoped you could finish this and him before we went to lunch.

How much of this do you necessarily have to have before he goes on?

MR. MANDEL: All of this relates to inconsistenc in the deposition -- I mean inconsistencies with the affidavi and the 9-G statement.

I think it would be disruptive entirely if I stopped reading or went to a selective portion and put Mr. Roth on and then went back again. Maybe we are going to waste another twenty minutes of Mr. Roth's time or fifteen. I have to read some of this anyway.

THE COURT: Do you represent that you will finish with your reading in fifteen minutes?

MR. MANDEL: How long have I been reading so far?

MR. GRUTMAN: One hour.

THE COURT: We have been going between the affidavits and other things an hour.

MR. MANDEL: Let me bring up what I have here and we will make a joint judgment because I legally don't know.

(Pause)

MR. MANDEL: I am at this point. I have not tallied up the pages. I am at this point. I have this far to go (indicating).

So I would say I am not halfway through.

MR. GRUTMAN: The burdens and imposition on my law firm have been enormous. The litigation department is terribly burdened and with the number of people out of the office I ask the Court to have Mr. Roth put on now.

If anything of the thing from the deposition he wants to use, he can interpolate them with Mr. Roth's interrogation. There has to be the cross examination and we want to put Mr. Roth back to work doing business instead of wasting time for our firm.

MR. SHAW: It looks like another twenty-five pag

THE COURT: Mr. Mandel; how essential is it that you get this in before?

MR. MANDEL: Some of it should where the man himself says that his affidavit is wrong, how he got it and so forth. That should come in before.

THE COURT: Can you go to those?

MR. MANDEL: Can I skip around? Yes. I will try to do that. I will come back.

MR. GRUTMAN: Can your Honor put some limit on this?

THE COURT: I put Mr. Mandel in professional awareness of the conditions here.

MR.MANDEL: Can you tell the jury what we are going to do?

MR. GRUTMAN: I object to that.

THE COURT: You put in what youcan.

(In open court)

THE COURT: Ladies and gentlemen of the jury, may I inquire whether it is agreeable to you to sit later starting even this evening? Have you discussed that?

THE FOREMAN: We have been talking about 5:30.

THE COURT: Is it agreeable to go to 5:30 tonight?

THE FOREMAN: Yes.

THE COURT: Mr. Mandel, do we have sufficient materials to proceed until 5:30?

MR. MANDEL: After today I find I am not a good judge of it.

THE COURT: Do you have much more available for this afternoon?

MR. MANDEL: I could go ahead with more deposition evidence.

THE COURT: Then we will sit this afternoon until either we hit 5:30 or you run out of materials, since we are extending the day.

MR. MANDEL: I hope your Honor will indulge me for a moment because we have agreed to a rearrangement of some of this.

THE COURT: Yes.

(Pause)

MR. MANDEL: I am going out of turn to page 86, line 22:

"Q Did you understand that you were taking a substantial risk in going into this deal with Newburger, Loeb & Company?"

MR. SHAW: I think we can skip the colloquy.

MR. MANDEL: No, because the statement of counsel was adopted by the client.

THE COURT: Wait a second.

MR. MANDEL: May I continue?

THE COURT: Yes.

MR. MANDEL:

"Q Did you understand you were taking a substantial risk in going into this deal with Newburger, Loeb & Company?

"Mr. Shaw: Isn't this repetitive? Hasn't the witness testified over and over again he would not go into the deal if he thought there was any risk whatsoever and he was assured there would be no risk.

"Q Is that correct, Mr. Aixala? Is that correct?

"A I didn't hear.

"Mr. Mandel: Read the question and Mr. Shaw's comment.

"(Record read)

"Mr. Shaw: Assured by Persky, that is what the witness has testified over and over again.

"Q That is the fact; is that your testimony?

"A That there would be a minimum risk, almost none.

"Q Who told you that besides Persky?

"A Just Persky.

"Q Did you discuss the amount of risk wish Risher?

"A No.

"Q You believed there would be no substantial risk when you went into the transaction; is that correct?

"A Right, that is correct.

"Q Do you recall whether you have ever submitted an affidavit in this action?

"A Yes.

"Q Did you sign such an affidavit?

"A I don't recall signing it but I must have.

"Q About when would that be, do you recall?

"A I don't recall.

"Q Did you read that affidavit before you signed it?

"A I must have.

"Q Did you understand it?

"A I just signed it, I know that.

"Q You just signed it without understanding it?

"A I don't even know if I read it.

"Q Are you saying that you believe you did not read it?

"A I don't know.

"Q Did you swear to that affidavit before a Notary Public or other official?

"A I don't recall.

"Q Where did you sign the affidavit?

"A I don't recall.

"Q You don't know if it was Miami or New York?

"A I think it would be in Miami. I don't recall.

"Q Where did the information come from for that affidavit?

"A From the lawyers.

"Q Did anybody ask you whether any facts were true or not when you signed them?

"A I don't recall.

"Q Did you have a discussion with any lawyers before you signed that affidavit?

"A I don't recall.

"Q Did you have a meeting with any lawyers before you signed the affidavit?

"A I don't recall.

"Q Well, I am going to show you an affidavit, Mr. Aixala, and ask you if that was your affidavit?"

Shall I skip the colloquy, Mr. Shaw?

MR. SHAW: Yes.

MR. MANDEL: All right. I stopped reading page 89, line 19.

MR. GRUTMAN: It goes on to the bottom of 91. We still don't get an answer there yet.

THE COURT: Go to the top of 93.

MR. GRUTMAN: Yes, that is where it begins.

MR. MANDEL: All right.

"Q Have you seen this affidavit before?

"A Yes."

The record should show that the witness was given an opportunity to read it, as was his counsel.

Is that fair, Mr. Shaw?

MR. SHAW: Yes.

MR. MANDEL:

"Q Have you seen this affidavit before?

"A Yes.

"Q Did you sign that affidavit?

"A I guess I did.

"Q Did you swear to it?

"A I" --

THE COURT: Is this an exhibit in this case?

MR. MANDEL: XXX.

THE COURT: The record may so reveal.

MR. MANDEL:

"A I guess I did.

"Q Did you have any discussions with anybody before it was prepared?

"A No. I don't recall.

"Q You don't recall whether you did or not?

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"A I don't think that I did.

"Q How was it presented to you?

"A I don't recall. I believe it was mailed but I don't know.

"Q Was there a covering letter with it?

"A Probably.

"Q Where is it?

"A I don't know.

"Q You don't know?

"A No.

"Q Did you throw it out along with the other papers?

Shall I skip the colloquy?

MR. SHAW: Yes.

MR. MANDEL:

"Q Did you throw it out?

"A Yes.

"Q When did you throw it out?

"A When I received it.

"Q Did you keep a copy of the affidavit for your own files?

"A I don't believe so.

"Q Did you read the affidavit before you signed it?

"A I probably did.

"Q Did you intend to tell the truth in the affidavit?

"A Yes.

"Q Did you call anybody and say there is something wrong in the affidavit?

"A No.

"Q Was the affidavit true to the best of your knowledge and belief at that time?

"A Generally.

"Q Was there anything in the affidavit that was not true at the time you signed it?

"A Sure.

"Q What?

"A Start with my name.

"Q Anything else?

"A You can read them. It said I met Persky in the summer, and I met him before the summer.

"Q Would you please go through this affidavit and tell me everything in it that is not true.

"A The summer of 1970, I met him before the summer o 1970.

"Q When did you first meet Mr. Persky?

"A I don't know exactly but my guess would be February or March.

"Q Of 1970? Anything else in the affidavit that is not true?

"A Let me go paragraph by paragraph. He said paragraph No. 3 in December 1970 I had occasion to be in New York and had lunch with Mr. Persky. At that time Mr. Persky discussed with me whether I would be interested in loaning a million dollars to a corporation to be formed to operate in a New York brokerage firm. The terms of the transaction were outlined to me by Mr. Persky. He asked me before. The million dollar figure wasn't at that meeting. After that it was mentioned, the million dollar figure. And the terms of the transaction at that time were not outlined to me.

"Mr. Shaw: Were not?

"The Witness: Outlined to me.

"It says I would be entitled to buy an unspecifie number of shares of the non-voting common stock of the corporation to be formed at a price -- of the corporation to be formed at a price of five cents per share. At that meeting they did not say that" --

MR. GRUTMAN: Yesterday you cautioned me against applying intonations and inflections and the same should apply to Mr. Mandel. He ought to read it flatly, without putting them to sleep.

THE COURT: Yes.

MR. MANDEL: I will tiptoe through the tulips between drama and lethargy, and I am going back.

"A At that meeting they did not say that the five cents a share -- I did not know what I was going to pay for the shares. He outlined to me I was aware that such an investment had substantial risk. Substantial was never mentioned. It was the other way around. It was minimal. It says in January I gave Mr. Persky the power of attorney. I probably did. I don't recall. I believe I had sent the Bacardi stocks to him before but I don't recall when I sent them to him.

"Q Have you now mentioned everything in your affidavit which you now say is untrue?

"A Correct.

"Q Yes?

"A Yes.

"Q Everything else that is in the affidavit you now stick by; is that correct?

"A That is correct.

"Q Did you know when the affidavit was sent to you that it was to be submitted to the Court?

"A I don't know exactly that it was submitted to the Court but it was needed for something.

"Q You knew it was going to be used in this action?

"A Yes.

"Q And you understood that an affidavit is required to be truthful, do you not?

"A Yes."

MR. SHAW: Objection to the remainder.

MR. GRUTMAN: It is just a statement.

THE COURT: There is no answer to it.

MR. GRUTMAN: We are on 99.

MR. MANDEL: Now to 98, line 11. I ended on --

MR. GRUTMAN: There is no answer, Mr. Mandel.

THE COURT: 99 at the top, Mr. Mandel.

MR. MANDEL: Excuse me, 98 line 11.

MR. GRUTMAN: There is no answer to that.

THE COURT: The question is repeated 99 at the top.

MR. MANDEL: 99, line 1.

MR. SHAW: I hope you will read through line 16.

THE COURT: Let Mr. Mandel read it.

MR. GRUTMAN: Now you are on 99.

MR. MANDEL: Please.

Your Honor, may I be protected against this?

THE COURT: I protect you. No statements from the counsel table unless it is to oppose an objection, please.

Go ahead.

"Q When you read the affidavit before you signed it, did you notice these things in it which you now say are untrue?

"A I probably did, yes.

"Q Before you signed it did you discuss these questions with anybody?

"A No.

"Q You just went ahead and signed it?

"A Yes.

"Q Did you have a reason for signing it, knowing it was untrue?

"A No. It was generally true.

"Q And you were satisfied with it in its then present form; is that what you are saying?

"A Yes."

I will interrupt at this time.

I call Mr. Roth to the stand, please.

#4 HERBERT F. ROTH, called as a witness on behalf of the plaintiffs, after being duly sworn, testified as follows:

x

DIRECT EXAMINATION

BY MR. MANDEL:

Q You are a member of the Bar of this State?

A That is correct.

Q You are now a partner in the firm of Finley, Kumble -- will you help me out?

A Heine, Underberg & Grutman.

Q And that is the same firm that was formerly known as Finley, Kumble --

MR. SHAW: So stipulated, your Honor.

A So stipulated. We are the firm named as the defendant in this case as Finley, Kumble, Underberg, Persky & Roth.

Q As of the 28th day of June, 1972, and at that time your firm was then acting as counsel for various parties in this action, including Alex Aixala; is that right?

A That is correct.

Q You were the attorney at Finley, Kumble in charge of the matter at that time; is that correct?

A At that time, yes. I was the partner in charge.

Q Did you prepare the notice of summary motion, the affidavit of Alex Aixala sworn the 28th of June, 1972, and the 9-G statement that accompanied it, which have been admitted in evidence here as Defendants' Exhibit SSS.

A I'm just about certain that I did. But let me review it, Mr. Mandel, to be sure the piece of paper is the same.

Q Certainly.

(Pause)

A That appears to be the document that I prepared, Mr. Mandel.

Q Now, may I have the document, please?

A Certainly.

Q Did you dictate Mr. Aixala's affidavit on the 9-G statement in your office here in New York?

A I'm not sure whether I wrote it or whether I dictated it, but I was the person who gave material to a secretary in our office in New York which resulted in that affidavit and that notice.

Q Where did you get the information from to put into that affidavit?

A Mr. Aixala when I spoke with him on the telephone on or about the 26th of June and from Mr. Robert Persky.

Q When did you speak to Mr. Persky?

A Sometime on or about the 26th. He was my partner, Mr. Mandel. I was speaking with him frequently with respect to this case because at that point you had made a voluminous motion for summary judgment --

Q I only asked you when you spoke with Mr. Persky.

A I am trying to explain. I spoke to him with frequency during that period of time.

Q What information did Mr. Persky give you in connection with the 9-G statement and the Aixala affidavit?

A My recollection is, and it was a long time ago, Mr. Mandel, I had not met or spoken with Mr. Aixala before on or about June 26th. I had been away from this case for approximately a year --

MR. MANDEL: I move to strike.

THE COURT: Strike that out. Just answer as responsively as you can.

Q What information did Mr. Persky give you?

A In words or substance he told me essentially that Mr. Aixala had basically given him a proxy or a power of attorney and that Mr. Aixala had basically relied upon Mr. Persky with respect to the details of the transaction, et cetera.

I am sure he gave me more background beyond that, Mr. Mandel, but I just cannot recollect with respect to the affidavit I prepared which of that material was given to me by Mr. Persky and which of it was given to me by Mr. Aixala.

Q How many telephone calls did you have with Mr.

Aixala?

A Prior to the preparation of that affidavit?

Q Yes.

A Just one.

Q And did Mr. Aixala tell you that he knew there was a substantial risk in this investment?

A I am not sure whether I got that from Mr. Aixala or whether I got that from Mr. Persky. But I know I sent the affidavit with that statement in it to Mr. Aixala and I got it back signed by Mr. Aixala several days later.

Q You sent it to Persky, didn't you?

A No, I sent the affidavit to Mr. Aixala in Florida.

I apologize. I may have sent it to Persky and it may have gone under Persky transmittal letter.

Q You sent it to Persky, I am trying to refresh your recollection and let me say to you that the answers to interrogatories say it was transmitted by Persky; will you accept that?

A No. I know it went under a Persky transmittal letter or whether Persky gave me the letter to attach the affidavit in and I was responsible for the mailing or whether I gave Persky the affidavit and he mailed it under his covering letter, I am not sure Mr. Mandel.

I know it went under a transmittal letter from Mr. Persky.

Q Did Persky check the affidavit before it was sent?

A I believe so, even though I don't have a distinct recollection. I'm guessing.

Q Who told you until after this deal Aixala had never met any of the principals?

Let me put it another way: Did you know Aixala had met with Risher on a number of occasions before you prepared the affidavit?

A No.

Q No.

Now, who told you that Aixala had never met any of the principals prior to February 11, 1971?

A Either Mr. Aixala or Mr. Persky or both. I have no distinct recollection of that event.

Q Who told you that the details of the deal were laid out, outlined to Aixala by Persky in December of 1970?

A My answer would be the same as to the prior question.

Q You don't know whether Aixala or Persky or both?

Q During your discussions with Aixala and your discussions with Persky, did you detect any inconsistencies at all?

A No. As a matter of fact -- the answer is no.

Q Do you remember whether you spoke to Persky first or Aixala first?

A I know I spoke with Persky first.

Q And then you called Aixala?

A It might be. I had never spoken with Aixala. My recollection is that Persky telephoned Aixala and introduced me in the course of the telephone conversation, Mr. Mandel, as his partner who was working on the litigation.

Q And you then spoke to Aixala?

A Yes. The reason I have a recollection of this incident because I do know I had never spoken to Aixala before this telephone conference.

Q About how long did the conversation last?

A I would be guessing, Mr. Mandel.

Q Did you already have a draft before you spoke to Aixala?

A I may have, I may have had notes, Mr. Mandel. I'm not sure.

Q Mr. Roth, I am showing you an answer to interrogatory sworn to on the 12th day of June, 1975, on behalf of the defendant Finley, Kumble and the first --

A Is that the one I signed, Mr. Mandel?

Q No.

A No, I signed it, Mr. Mandel. Mr. Gelb signed the first page but I signed the answer and verification.

May I look at it?

Q Yes. I call your attention to Paragraph 1 which says, "The Alex Aixala affidavit was not prepared by Finley, Kumble, Underberg, Persky & Roth."

What did you mean by that, Mr. Roth?

A I mean I was the person who wrote it as I state it in the next sentence.

Q You were a member of the Finley, Kumble firm?

A That is correct. To that extent the firm prepared it.

Q You did it on behalf of the firm, as part of your work for the firm?

A That is correct.

Q And you did it with the knowledge and authority of your partners for handling this case, did you not?

A That is correct.

Q Did you therefore retract this answer to interrogatory that the Alex Aixala affidavit was not prepared by Finley, Kumble, Underberg, Persky & Roth?

A No, sir. I think the statement, the two questions that I actually did it, that I was authorized by the firm, I think those are absolutely correct.

Q You don't contest firm responsibility?

A I do not. But those individuals did not.

CROSS EXAMINATION

BY MR. GRUTMAN:

Q What college were you graduated?

A Dartmouth College.

Q Upon your graduation of Dartmouth College, what law school did you attend?

A Harvard Law School.

Q When you were graduated from the Harvard Law School, what employment did you have?

A Law Secretary for the Honorable William B. Herlands, then a Judge in the United States District Court in this court.

Q How many years did you serve as law clerk for Judge Herlands?

A Two years.

Q Upon the completion of your tenure with Judge Hurlanz, what is the next professional employment that you had?

MR. MANDEL: I object.

THE COURT: Sustained. Strike the answer.

Q Did you rely in part in preparing papers in this case on information which was supplied to you by other partners or associates?

A Yes, sir.

Q And according to your understanding, was that consistent with accepted practices generally followed by other attorneys in New York City at that time?

A Yes, sir.

MR. MANDEL: I object to that question.

THE COURT: Objection sustained. Strike out the answer.

Q When the affidavit Mr. Mandel showed to you was prepared, was it first drawn in draft?

A Yes, sir.

Q Who drew it in draft?

A My best recollection is, and I might be mistaken, my best recollection is I would have drawn it in draft. I would have gotten the information from Mr. Persky but I would have drawn it in draft.

Q Had you had the telephone conversation with Mr. Aixala and Mr. Persky, in which you met Mr. Aixala, before you reduced the affidavit to draft form?